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## COMMENT

# DEPENDENT INDEPENDENCE: APPLICATION OF THE NUNAVUT MODEL TO NATIVE HAWAIIAN SOVEREIGNTY AND SELF-DETERMINATION CLAIMS

Jeffrey Wutzke\*

### *Introduction*

In the late summer of 1996, Native Hawaiians voted to "elect delegates to propose a Native Hawaiian government."<sup>1</sup> What exactly a "Native Hawaiian government" meant for purposes of the referendum was left undefined;<sup>2</sup> the possibilities range from complete independence from the United States,<sup>3</sup> to the creation of some type of "state within a state" jurisdiction, to some form of state-chartered corporation or council.<sup>4</sup> Whatever its ultimate goal, the Native Hawaiian sovereignty movement is simply the most recent, and certainly not the last, in a series of efforts by aboriginal<sup>5</sup> bands in Canada and the United States to achieve a greater say in how their people are governed, their land managed, and their culture preserved.<sup>6</sup> This comment uses the self-determination claims

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1. Ellen Nakashima, *Native Hawaiians Consider Asking for their Islands Back: 100-Year-Old Cause Spurs Sovereignty Vote*, WASH. POST, Aug. 27, 1996, at A1. Voting was done by mail; the ballots were sent out on July 1, and had to be returned by August 15. The final tally was 22,294 votes *ae*, or yes, for the referendum; this represents 73% of the 30,423 eligible votes cast. Reuter, *Hawaiians Vote to Start Process for Sovereignty*, WASH. POST, Sep. 13, 1996, at A4; Hawaiian Sovereignty Election Council, *HSEC — Current Update* (visited Mar. 8, 1997) <<http://planet-hawaii.com/hsec/alert.html>>.

2. Reuter, *supra* note 1.

3. That independence is a goal of at least some Native Hawaiian sovereignty activists, and not merely academic speculation, is evidenced by statements made by some of the referendum's supporters. *See infra* Part III.E.

4. *See infra* Part III.B for a discussion of the corporate and municipal forms of U.S. tribal association.

5. This comment generally uses the term "aborigine" rather than "Indian" or "Native American"; similarly, this comment uses the Canadian term of choice, "First Nation," to refer to aboriginal nations in Canada. The term "Native Hawaiian" (*Kanaka Maoli* in Hawaiian) refers to the descendants of the original inhabitants of Hawaii, and not to the descendants of Europeans or Americans who immigrated to the islands before their annexation by the United States. The term is used more broadly than in the U.S. Code, which defines Native Hawaiian as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands before January 1, 1778." 12 U.S.C. § 1715z-12(d)(1) (1994); 16 U.S.C. § 396a(b) (1994).

6. Charles F. Wilkinson, *Land Tenure in the Pacific: The Context for Native Hawaiian Land*

of the Inuit, in northern Canada, as a point of comparison to the Native Hawaiian sovereignty movement. Specifically, the Canadian federal government's response to the Inuit claims — to carve a new territory, Nunavut, out of the Northwest Territories in 1999 — is examined as a possible model for the Native Hawaiian sovereignty movement. Although these two peoples are distinguishable in many ways, such a comparison is feasible because of certain basic underlying similarities between the Inuit and Native Hawaiian claims and the broader administrative environment in which they are addressed.

Some of these similarities lie on the aboriginal side of the equation. While it is certainly true that North American aborigines are a diverse people with hundreds of distinct cultures,<sup>7</sup> it is also true that these peoples' similarity of situation and treatment allow for reasonable comparisons and contrasts.<sup>8</sup> As Fergus Bordewich notes:

"[T]he Indian," as such, really exists only in the leveling lens of federal policy and in the eyes of those who continue to prefer natives of the imagination to real human beings. There are, however, certain common threads that link the broader experience of modern Indian tribes as they pursue their quest for [sovereignty].<sup>9</sup>

North American aboriginal groups participate in a variety of cross-border sharing of advocacy and negotiation techniques,<sup>10</sup> using the latest in

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*Rights*, 64 WASH. L. REV. 227, 231 (1989).

7. Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427, 432-33 & 445 (1995) (listing 499 "tribal groups" with federal recognition and 136 without); Bureau of Indian Affairs, *American Indian Today* (visited Mar. 27, 1997) <<http://www.doi.gov/bia/aitoday/aitoday.html>> (listing 554 units of governance and over 250 languages).

8. The social welfare conditions of aborigines in Canada and the United States is both comparable and far below that of the majority population on both sides of the border. See Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economics and Families*, 53 FORDHAM L. REV. 315 (1984); see also Brad W. Morse, *A View from the North: Aboriginal and Treaty Issues in Canada*, 7 ST. THOMAS L. REV. 671, 674-75 (1995) (noting many similarities in culture, historical treatment, and current socioeconomic condition between Canadian and U.S. aboriginal bands) (Morse is the Executive Assistant to Canada's Federal Minister of Indian Affairs and Northern Development). But cf. Kahanu & Van Dyke, *supra* note 7, at 428 ("Many Hawaiians . . . want to develop a status that provides more autonomy than that provided to Indians and other Native Americans."). Even the idea that the Native Hawaiians as a group are united in their political views or express common cultural traits may be suspect. See Andrew Hiroshi Aoki, *American Democracy in Hawai'i: Finding a Place for Local Culture*, 17 U. HAW. L. REV. 605, 606 (1995); Elizabeth Pa Martin, *Hawaiian Natives Claims of Sovereignty and Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 273, 281-82 (1991).

9. FERGUS M. BORDEWICH, *KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY* 18-19 (1996).

10. See, e.g., *R. v. Lovelace*, 38 C.R.R.2d 297, 298 (1996) (noting that U.S. tribes' success in raising revenue through gambling influenced some First Nations to seek authority to do the

communications technology.<sup>11</sup>

On the governmental side, basic similarities between Canada and the United States include both constitutional tenets and federal policy regarding aboriginal self-determination. These similarities flow from a shared political foundation, including notions about sovereignty, federalism, separation of powers, the Rule of Law, and the common law judicial system, including private property rights.<sup>12</sup> This political foundation stems largely from their joint administration as British colonies until the American Revolution.<sup>13</sup> A second policy-level foundation follows from the cross-border influence of each country's aboriginal policy on the other.<sup>14</sup>

same); Morse, *supra* note 8, at 673; Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 174 (1991).

11. E.g., Bill Henderson, *Aboriginal Law and Legislation* (visited Sep. 19, 1996) <<http://www.bloorstreet.com/300block/ablawleg.htm>> (listing aboriginal laws of Canada, the United States, New Zealand, and Australia) [hereinafter Henderson, *Aboriginal Law*]; Indian Health Service, *Native American Resources on the Internet* (visited Mar. 27, 1997) <<http://www.tucson.ihs.gov/1amerind/ai.html>> (listing several dozen other web sites for aboriginal groups and information, including Canadian sources); Inuit Circumpolar Conference, *About Us* (visited Mar. 26, 1997) <<http://www.inusiaat.com/icc/main-icc.htm>> (group representing Inuit in Canada, Greenland, Russia, and the United States, and having NGO status at the U.N.); see also American Indian Movement, *American Indian Movement* (visited Mar. 15, 1997) <<http://dickshovel.netgate.net/AIMIntro.html>> (rights advocacy group); Indianworld, *Mending the Sacred Circle* (visited Mar. 15, 1997) <<http://www.indianworld.org>> (cultural preservation group).

12. Morse, *supra* note 8, at 672 & 676-77 ("we share many essential elements when it comes to Aboriginal issues"; recall that Morse is Executive Assistant to Canada's Minister of Indian Affairs and Northern Development); see also R. v. Van der Peet, 109 C.C.C. 3d 1, 32 (1996) (Lamar, C.J.C.) (noting for the Canadian Supreme Court that early U.S. aboriginal rights cases, such as *Johnson v. M'Intosh* and *Worcester v. Georgia*, "are as relevant to Canada as they are to the United States") (citing Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. BAR REV. 727, 739 (1987)); R. v. Van der Peet, 83 C.C.C. 3d 289, 315 (1993) (Lambert, J., dissenting) ("[H]armony between the rights of Indians on each side of the 49th parallel should be what one would expect if the common law on both sides of the border were applied to the same customs, traditions and practices on both sides of the border."); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1515 (W.D. Wash. 1988) (citing decisions of the British Columbian Supreme Court in a U.S. case with comparable facts); Jeffrey L. Friesen, *The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models*, 94 COLUM. L. REV. 1415 (1994).

13. John T. Cross & Kristin M. Lomond, *The Civil Rights of the Aboriginal Peoples of the United States and Canada*, 10 ARIZ. J. INT'L & COMP. L. 253, 253 (1993).

14. See, e.g., R. v. Recalma, 1996 Can. Tax Ct. LEXIS 2523, at \*7 (June 17, 1996) (comparing Canadian and U.S. restrictions on non-federal taxing of Native Americans); Brian R. Campbell, *Castig a Net Into Turbulent Waters: Indian Salmon Fishing Rights in Canada and the United States*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 101, 106 (1994) (adding that "[i]n Canada, legal relations between First Nations and the government are just as strained as those south of the border."); Cross & Lomond, *supra* note 13, *passim*; Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, *passim* (1991); Morse, *supra* note 8, at 672 (observing that "[t]he knowledge of the successes and failures that have occurred in Canada can provide an excellent reference point from which to assess how these same issues have evolved in the territory now known as the [U.S.]")

This comment begins in Part I with a discussion of what is meant by the terms "sovereignty" and "self-determination" under international law. This discussion will show that the terms can be applied, albeit inexactly, to virtually all aboriginal groups in North America, and especially those of both the Inuit and the Native Hawaiians. Parts II and III canvass the history of aboriginal/federal government interaction in North America. Given the timespan and the great diversity of aboriginal peoples, geography, and governmental policies involved, this treatment is of necessity broad, capturing only the major themes and highlights appropriate to the analysis of aboriginal self-determination claims and the particulars of the Inuit and Native Hawaiian nations. Part II focuses on historical and contemporary Canadian aboriginal policies. The Inuit, their claims, and the Canadian Nunavut Agreement are described more fully in Part II.D-E. Part III reviews U.S. historical and contemporary aboriginal policies. Parts III.C-D examine more closely the history of Native Hawaiians and their annexation by the United States. Part IV then revisits the definitions of sovereignty and self-determination presented in Part I, analyzing the applicability of the Nunavut model to Native Hawaiian claims in light of the preceding discussion. For reasons peculiar to the differences between Canada and the United States, the Nunavut model of strong aboriginal self-determination is ultimately inapplicable to the Native Hawaiian setting, whether the ultimate Native Hawaiian goal is obtaining the status of a mainland-style tribe or becoming an independent nation-state. Moreover, outright independence for the Native Hawaiians is neither likely nor desirable due to distinctions between aboriginal and colonial peoples in the doctrines of sovereignty and self-determination. Instead, a middle approach emphasizing the flexibility inherent in a federal system of government is both more likely to occur and more suited to the Native Hawaiians' full range of needs.

### *I. The Concept of Sovereignty*

*[A] sovereign government unlike a free individual is Janus-faced: it simultaneously faces both outward at other states and inward at its population.*

— Robert Jackson

While there is a large body of United States jurisprudence addressing American tribes as "dependent domestic nations,"<sup>15</sup> what Native Hawaiian and other aboriginal groups seek today conceivably goes far beyond the notion of limited sovereignty to encompass outright independence.<sup>16</sup> Therefore an

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and noting the "many" aboriginal bands that straddle the Canadian/U.S. border).

15. See *infra* Part III.A (discussing the development of the U.S. Supreme Court's treatment of Native American tribal sovereignty).

16. See *infra* notes 337-39 and accompanying text.

accurate application of the Nunavut model to the Native Hawaiian claim begins by examining what international lawyers and publicists mean by the terms "sovereignty" and "self-determination."

#### A. "Sovereignty"

In international law, "sovereignty" means constitutional independence from other states. It is "a legal, absolute, and unitary condition" in which a state acts independently, free from nonconsensual constraints.<sup>17</sup> "The most fundamental element of sovereignty is the right to choose and establish a form of government."<sup>18</sup>

Publicists, including Robert Jackson, describe a distinction between "external" or "negative" sovereignty and "internal" or "positive" sovereignty.<sup>19</sup> The first type of sovereignty "connotes equality of status *between* the states"<sup>20</sup> and requires "freedom from outside interference."<sup>21</sup> The latter, internal or positive sovereignty entails "the exercise of supreme authority . . . within [states'] individual territorial boundaries"<sup>22</sup> and allows governments "the wherewithal to provide political goods for its citizens."<sup>23</sup> "A sovereign has authority over people and territory within its boundaries regardless of their citizenship or the land titles."<sup>24</sup> Jackson adds that it is positive sovereignty that allows governments to "collaborate with other governments in defense alliances and similar international arrangements and reciprocate in international commerce and finance."<sup>25</sup>

#### B. "Self-Determination"

Self-determination is closely linked to concepts of sovereignty; what sovereignty is to governments, self-determination is to peoples. Jackson notes

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17. ALAN JAMES, *SOVEREIGN STATEHOOD* 25 (London, 1986).

18. Kahanu & Van Dyke, *supra* note 7, at 445.

19. See GEOFFERY L. GOODWIN, *THE EROSION OF EXTERNAL SOVEREIGNTY, IN BETWEEN SOVEREIGNTY AND INTEGRATION* 100 (Ghita Ionescu ed., 1975); ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* 27-29 (1990). This distinction can also be found in U.S. Supreme Court jurisprudence on tribal sovereignty. See *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 425-26 (1989) (stating that "an Indian tribe generally retains sovereignty by way of tribal self-government and control over other aspects of its *internal* affairs" but "[a] tribe's inherent sovereignty . . . is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's '*external* relations'") (emphasis added) (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978) and citing *Montana v. United States*, 450 U.S. 544, 564 (1981)).

20. GOODWIN, *supra* note 19, at 100.

21. JACKSON, *supra* note 19, at 27.

22. GOODWIN, *supra* note 19, at 100.

23. JACKSON, *supra* note 19, at 29.

24. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1588 (1996).

25. JACKSON, *supra* note 19, at 29.

that "[s]overeignty [today is] based on a universal doctrine of *categorical* self-determination which [does] not presuppose underlying nationhood but only subject colonial status."<sup>26</sup> As such, the people, not "princes," are the basis of authority; "self" means nation, whether defined by political tradition or ethnic characteristics, and "determination" means the capacity of those people to establish an independent government based on their own constitution.<sup>27</sup> The United States is a party to the International Covenant on Civil and Political Rights, which states that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>28</sup> To Bertrand de Jouvenel, "[t]he essential freedom [is] to create a gathering, to generate a group, and thereby introduce in society a new power, a source of movement and change."<sup>29</sup>

The U.N. Charter, and that of its predecessor, the League of Nations, both reference self-determination,<sup>30</sup> although it is listed in the former as a "principle" rather than an "obligation."<sup>31</sup> The U.N. General Assembly has also approved "a succession" of resolutions which have shaped the modern international law doctrine of self-determination "as a *categorical* right of all *colonial* peoples."<sup>32</sup>

### C. Applying the Definitions

#### 1. Aboriginal Sovereignty Generally

An examination of aboriginal arguments for sovereignty reveals the characteristics desired by aboriginal leaders for their governments — internally the ability to regulate and provide for their own people, which includes the right to form a government, determine membership, legislate, administer justice, and provide a stable economic environment; externally equality of status, and freedom of decision making.<sup>33</sup> De Jouvenel associates these characteristics with the core notion of "justice": "to guarantee to each nation, the weak as well as the strong, the tranquil enjoyment of what each had had."<sup>34</sup> Indeed Jackson

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26. *Id.* at 75.

27. *Id.* at 75.

28. International Covenant on Civil and Political Rights, art. 1, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), *ratified* Sept. 8, 1992.

29. BERTRAND DE JOUVENEL, *SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD* 299 (J.F. Huntington, trans., 1957).

30. *Id.* at 141.

31. JACKSON, *supra* note 19, at 76 (citing U.N. charter arts. 1 & 55).

32. *Id.* at 76 (emphasis added) (citing U.N. General Assembly Resolutions 421/1950, 637/1952, and 1188/1957).

33. Kahanu & Van Dyke, *supra* note 7, at 437-42; Reuter, *supra* note 1; Judith V. Royster & Rory Snowarrow Fausett, *Fresh Pursuit onto Native American Reservations: State Rights To Pursue Savage Hostile Indian Marauders Across the Border*, 59 U. COLO. L. REV. 191, 276 (1988) [hereinafter Royster & Snowarrow Fausett, *Fresh Pursuit*].

34. DE JOUVENEL, *supra* note 29, at 141-42. To that end, it is important to distinguish

notes that the latter has been intimately associated with the concept of decolonization: "it is the distinctive liberty acquired by former colonies as a consequence of the international enfranchisement movement."<sup>35</sup>

The aboriginal claim to sovereignty can be said to extend from two bases: historical right and modern treatment. The first strand emphasizes that all North American aboriginal bands were once sovereign entities. A modern discussion of aboriginal sovereignty (including this one) must take place within the context of the existing state territorial system, based on European norms. Indeed the very idea of a sovereign nation-state "[is] a European concept that . . . never existed in pre-Columbian America."<sup>36</sup> Yet before this system was established — before European contact with North America — there can be no question that sovereignty existed among the aboriginal inhabitants of the continent.<sup>37</sup> Where that sovereignty resided — the clan, the village, the tribe or language group, or a federation<sup>38</sup> — varied depending on the people in question, but in the absence of outside interference these people can be said to have been sovereign in their own right.<sup>39</sup> In spite of, or perhaps because of, this ex-cultural origin of certain governance concepts, "tribal concepts of governmental authority often hinge on moral constructs that differ from the European notions of 'sovereignty' and 'self-determination.'"<sup>40</sup>

## 2. *The Native Hawaiian Claim*

The irony, of course, is that, with the possible exception of the Iroquois (*Hodенosaunee*),<sup>41</sup> Native Hawaiians had the most organized and developed of governments with which to meet European (and American) pressures in North America. Certainly the Hawaiian monarchy was the most recent of the aboriginal governments in terms of time, and it also had more clearly defined

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aboriginal sovereignty claims from aboriginal claims over a traditional or current land base. See *infra* notes 54-59 and accompanying text.

35. JACKSON, *supra* note 19, at 27.

36. BORDEWICH, *supra* note 9, at 313.

37. See *Yakima Indian Nation*, 492 U.S. at 425 (stating that "[p]rior to the European settlement of the New World, Indian tribes were 'self-governing sovereign political communities'" (quoting *Wheeler*, 435 U.S. at 322-33); Kahanu & Van Dyke, *supra* note 7, at 428 ("Indian tribes exercised self-governance and self-determination long before the establishment of the United States of America."). But cf. *infra* text accompanying note 310.

38. For example, the Iroquois (*Hodенosaunee*) were a federation of tribes in what is now the northeastern United States. JACK WEATHERFORD, *INDIAN GIVERS* 121-23, 128-30, 135-36, 145 (1988).

39. But cf. BORDEWICH, *supra* note 9, at 71 ("Although the principle of tribal sovereignty rests on the premise that modern tribes are the direct continuation of nations that pre-date the founding of the United States, the governments of all but a few are wholly a twentieth-century invention.").

40. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 228 (1996).

41. See WEATHERFORD, *supra* note 38, at 135-43.



boundaries and stronger international recognition than mainland tribes. The independence of the Hawaiian monarchy had been recognized in treaties with European powers<sup>42</sup> as well as the United States.<sup>43</sup> As Secretary of State Daniel Webster wrote:

The United States have regarded the existing authorities in the Sandwich Islands [Hawaiian Islands] as a government suited to the condition of the people, and resting on their own choice; . . . [T]he President [is] quite willing to declare, as the sense of the Government of the United States, that the Government of the Sandwich Islands ought to be respected; that no power ought either to take possession of the islands as a conquest, or for the purpose of colonization, and that no power ought to seek for any undue control over the existing government.<sup>44</sup>

### 3. The Inuit Claim

The Inuit also have a colorable historical claim to sovereignty, albeit from a different angle. Assertions of sovereignty, whether European or aboriginal, must generally be accompanied by permanent occupation.<sup>45</sup> The Inuit did not have a single, centralized government either before or after contact with Europeans; their society consisted of somewhat isolated fishing villages distributed throughout the Canadian Arctic, and was (and is) closely linked to that of other Arctic people in coastal Europe and Asia.<sup>46</sup> The permanent occupation standard is somewhat subjective, however, especially as regards the inhospitable polar regions.<sup>47</sup> Because the Inuit at that time were able to engage in trade and transit and maintain internal order, they had a valid claim to sovereignty even at this late date.<sup>48</sup> Furthermore, Canada did not begin to assert

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42. Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawaii's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463, 464 (1995) (listing Austro-Hungarian, Belgian, Danish, Dutch, Japanese, Italian, Portuguese, Russian, Spanish, Swedish-Norwegian, and Swiss treaties with the Hawaiian monarchy); Wilkinson, *supra* note 6, at 228 n.11.

43. Francis Anthony Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law*, 7 ST. THOMAS L. REV. 723, 727 (1995); Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77, 80 (1991).

44. RALPH S. KUYKENDALL, *THE HAWAIIAN KINGDOM 1778-1854*, at 194 (1938, 1968 ed.) (quoting Daniel Webster to Haalilio and Richards (agents of Hawaii) (Dec. 19, 1842)).

45. GUSTAV SMEDAL, *DE L'ACQUISITION DE SOUVERAINETÉ SUR LES TERRITOIRES POLAIRES* 53 (Pierre Rokseth, trans., Rousseau et Cie., ed. 1932) (occupation must be "durable et réel").

46. See Inuit Circumpolar Conference, *supra* note 11; see also *infra* notes 162-66 and accompanying text.

47. SMEDAL, *supra* note 45, at 51.

48. *Id.* at 51 ("Il va sans dire que si l'autorité locale devait être en état de faire respecter les droits acquis, la liberté du commerce et du transit, et de maintenir l'ordre dans des régions où la

sovereignty over the Arctic shore and islands until 1907,<sup>49</sup> and did not begin substantive administrative actions in the region until 1922.<sup>50</sup>

#### 4. Additional Factors in the Sovereignty Equation

In addition to the historical sovereignty foundation, aboriginal claims to a right of self-determination follow from their treatment within the larger nation-state, including concerns over governmental legitimacy, group identity (here indelibly tied to race as a defining characteristic),<sup>51</sup> and the role of the legislative process versus the legal system in defining and protecting aboriginal rights. Leon Dion notes that internal struggles of the type being pursued by the Native Hawaiians are in part directed against a state's leaders "for their failure to act according to the values in which they claim to believe (liberty, equality, human dignity, etc.) or again, for their inability to redefine and adjust these values to the demands of the present."<sup>52</sup>

What is called into question today is not some dysfunctions in the social and political systems which, when all is said and done, are easily remedied. The crisis extends to the legitimacy of the organizations and leaders; to the integration of its members in the political system; to the involvement of its members in the life of the organizations, to the rules and processes which decide how goods and services are to be shared between individuals and collectivities.<sup>53</sup>

The factors influencing this strand of the aboriginal sovereignty claim are complex. Nevertheless the social welfare based claim would seem, on first

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population indigène peut être nombreuse et belliqueuse, il était indispensable de la doter de moyens coercitifs importants.").

49. *Id.* at 44-45 ("A ce sujet, rappelons qu'en 1907 le sénateur canadien M. Poirier émit une proposition tendant à faire déclarer que le Canada prenait possession des «terres et îles» situées entre sa côte septentrionale et le pôle Nord.").

50. *Id.* at 53 ("Le ministère de l'Intérieur, section des Territoires du Nord-Ouest, a organisé en 1922 une expédition dont le résultat a été l'établissement de stations de police, de douane et de poste en divers endroits de la région septentrionale, avec le dessein d'établir chaque année d'autres stations semblables jusqu'à faire respecter, en toute certitude, le lois et ordonnances du Canada dans les contrées qui sont soumises au contrôle de ces postes avancés de la civilisation."); see also David F. Pelly, "The Faces of Nunavik," CAN. GEOGRAPHIC, Jan. 1995, at 24 (quoting one Inuk as saying that the Province of Québec, though granted lands north to Baffin Sound in 1912, see *infra* note 106, did not "move in with their infrastructure" until 1964).

51. BORDEWICH, *supra* note 9, at 13 (stating that "tribal sovereignty [bestowed] practical autonomy upon groups of people whose very identity was, at least arguably, based on obsolete ideas of race and ethnicity").

52. Léon Dion, *Anti-Politics and Marginals*, in BETWEEN SOVEREIGNTY AND INTEGRATION 34 (Ghita Ionescu ed., 1975).

53. *Id.* at 34-35 (citing LÉON DION, SOCIÉTÉ ET POLITIQUE: LA VIE DES GROUPES: VOLUME 2, DYNAMIQUE DE LA SOCIÉTÉ LIBÉRALE 469-70 (Presses de l'université Laval 1971)).

blush, to fit within the decolonization body of international law dealing with ethnic group sovereignty and self-determination.

The reader should note the important connection between calls for aboriginal sovereignty and calls for control over a land base for the aboriginal population. "[I]t is gross violations of human rights that commonly create a minority's need . . . for a specific territorial base."<sup>54</sup> In addition, land rights "form the foundation for the exercise of other rights. 'Land is not just real estate . . . land is part of the essence of who indigenous people are. It needs to be understood within the context of their spirituality and their holistic sense of creation and humanity . . . [a] landless indigenous person is a person at real risk.'"<sup>55</sup> Others go even further, and argue that the loss of control over land is more damaging to aboriginal bands than the loss of internal sovereignty.<sup>56</sup> For all these speakers the two concepts, sovereignty and land, interweave closely;<sup>57</sup> for the Native Hawaiian claim the connection seems even more obvious.<sup>58</sup> For example, the essence of the minimal Native Hawaiian goal, a "traditional tribal model," is a federally recognized tribe with a defined land base held in trust by the federal government.<sup>59</sup> At the same time lands historically (preannexation) held by the chiefs and monarch of the Hawaiian government<sup>60</sup> now rest in the hands of the State of Hawaii and the U.S. government, accessible to Native Hawaiians only through application and permit. The potential severability of land-based claims from the other sovereignty issues, however, could prove to be a useful tool for addressing the self-determination or internal sovereignty claim.

Finally, this comment does not venture to tie in discussions of "cultural sovereignty" or the interaction of native religious ideas, ancient and modern, to the right of self-determination: Although some authors see these subjects as "linked inextricably, because the ultimate goal of political sovereignty is the

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54. HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 465 (1990).

55. Alexandra Kersey, *The Nunavut Agreement: A Model for Preserving Indigenous Rights*, 11 ARIZ. J. INT'L & COMP. L. 429, 446 (1994) (citing Lucia Mouat, *Indigenous People Press for Rights*, CHRISTIAN SCI. MONITOR, June 9, 1993, at 9 (quoting Reverend Paul Reeves, Anglican Communion observer at the U.N. and former Governor-General of New Zealand)).

56. Getches, *supra* note 24, at 1584.

57. Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996); Torres, *supra* note 10, at 133, 138; Alex Tallchief Skibine, *Braid of Feathers: Pluralism, Legitimacy, Sovereignty, and the Importance of Tribal Court Jurisprudence* 96 COLUM. L. REV. 557 (1996) (reviewing FRANK POMMERSHEIM, *BRAID OF FEATHERS* (1995)) [hereinafter Tallchief Skibine, *Braid*].

58. Kahanu & Van Dyke, *supra* note 7, at 444-45 (emphasizing that "the limited land and natural resources available in Hawaii" make it "imperative" that Native Hawaiians have control over a land base); see *infra* Parts III.D & E.

59. Kahanu & Van Dyke, *supra* note 7, at 432.

60. See *infra* notes 303-04 and accompanying text.

protecting of a way of life,"<sup>61</sup> viewing "political sovereignty" (or self-determination generally) as a goal in its own right is equally valid — that is, aboriginal peoples can be in control of their own lives, whatever expressions of culture and society they adopt. Indeed, whatever the cultural outlook of the governing structure, the modern aboriginal expression of sovereignty and self-determination will require such everyday tenets of the modern bureaucratic state as tax codes, environment and development regulations, and some form of judicial system.<sup>62</sup>

## II. Canadian Aboriginal Policies

### A. The Common, Colonial Period

Several practices initiated during the colonial period by the European powers continue to impact Canadian and U.S. federal aboriginal policies, and more specifically the topic of aboriginal sovereignty and self-determination.<sup>63</sup> Important among these practices were the conquest-oriented approach of the European powers, the development of the reservation system, and the initiation of the use of treaties as a means of interaction between European states and aborigines at the formal level.

The first association between North American aborigines and Europeans centered on a trading relationship. The French and English, in particular, vied for decades for the native fur trade.<sup>64</sup> For example, the English monarch Charles II created the Hudson's Bay Company in 1670,<sup>65</sup> granting it exclusive trading rights for a large tract of north-central North America.<sup>66</sup> While trading contacts increased the aborigines' impact on the surrounding wildlife resources and altered the aboriginal economy, making aborigines increasingly dependent on traders for manufactured goods,<sup>67</sup> they did not necessarily implicate a

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61. BORDEWICH, *supra* note 9, at 171, 210; *see also supra* text accompanying note 55.

62. *Id.* at 71, 171, 210; *see also* M.R. Franks, *Sovereignty, Statehood, and Self-Determination Claims to Statehood in International Law*, 12 NW. J. INT'L L. & BUS. 231, 232-33 (1994) (reviewing NII LANTE WALLACE-BRUCE, *SOVEREIGNTY, STATEHOOD, AND SELF-DETERMINATION CLAIMS TO STATEHOOD IN INTERNATIONAL LAW* (1994)) (examining the idea of statehood and examining alternatives to statehood for aboriginal peoples).

63. James [Sakej] Youngblood Henderson, *Empowering Treaty Federalism*, 58 SASK. L. REV. 241, 245 (1994) (arguing that "existing federalism reflects political domination and oppression build on colonial misunderstandings"); *see also* Treaty Land Entitlement Committee of Manitoba, Inc. (TLE), *A Debt to be Paid — Chapter 1* (visited Dec. 3, 1996) <<http://www.abinfohwy.ca/tlecomm/debt2.htm>> [hereinafter TLE, *A Debt To Be Paid Ch. 1*].

64. Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 570 n.13 (1995). France and England entered treaties between themselves in 1667 and 1713 to shift trading rights in northern North America. *Id.*

65. WEATHERFORD, *supra* note 38, at 22.

66. *Id.*; TLE, *A Debt To Be Paid Ch. 1*, *supra* note 63.

67. *See* MICHAEL D. GREEN, *THE POLITICS OF INDIAN REMOVAL* 17-30 (1982) (detailing the trading relationship's effects on the Creek people specifically); Torres, *supra* note 10, at 131, 134.

destruction of aboriginal sovereignty.<sup>68</sup> The Hudson's Bay Company, for instance, made only minimal appropriations of land for the occasional trading post. Its charter, however, was only one of several such unilateral dedications of jurisdiction,<sup>69</sup> and points the way to the first of the colonial era's impact on Canadian and U.S. aboriginal policies.

At the time of conquest, in the sixteenth to eighteenth centuries, the European powers did not see any contradiction between their actions and their recognition of native sovereignty. Although many aboriginal peoples, such as the Aztec or the Iroquois, had complex governing systems covering large areas and numbers of people,<sup>70</sup> the European powers used the notion of *res nullius* (or *terra nullius*) and asserted their right as "civilized" and Christian states to impose their authority on those who did not (to them) fit that description.<sup>71</sup> Thus the Europeans saw no contradiction between interacting with these tribal governments, or even a local band's chief, and at the same time declaring huge swaths of territory as belonging to a particular colony or trading company, despite the obvious and permanent aboriginal habitation of such territory.<sup>72</sup> Indeed it was here that the dichotomy that so strikingly distinguishes the concept of "aboriginal title" appeared; for the Europeans, the territory was theirs, even as the title remained in aboriginal hands until severed by conquest or treaty.<sup>73</sup>

Along the Atlantic seaboard and St. Lawrence River valley permanent

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68. Indian and Northern Affairs Canada (INAC), *The Canadian Indians* (visited 22 Nov. 1996) <<http://www.inac.gc.ca/pubs/indian/french.html>> [hereinafter INAC, *Canadian Indians: french.html*].

69. See generally OSCAR THEODORE BARCK, JR. & HUGH TULMAGE LEFLER, *COLONIAL AMERICA* 81-97 (1958) (describing royal charters to joint-stock companies, such as the Massachusetts-Bay Company, that led to colonial governments); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1285-87 (1996) (noting the varying powers of the colonial governments and the British crown under the different company and colony charters granted over a period of more than a century and a half).

70. Regarding the Aztecs, see, e.g., WEATHERFORD, *supra* note 38, at 143-44; Adriana De Aguinaga, *The New Agrarian Law — Mexico's Way Out*, 24 ST. MARY'S L.J. 883, 885 (1993); James J. Kelly, Jr., *Article 27 and Mexican Land Reform: The Legacy of Zapata's Dream*, 25 COLUM. HUM. RTS. L. REV. 541, 546-47 (1994). Regarding the Iroquois, see, e.g., WEATHERFORD, *supra* note 38, at 135-43; Julie L. Caldwell-Hill, *Environmental Regulation in Native America*, 24 N. KY. L. REV. 81, 82 n.8 (1994); Steven Paul Mcsloy, "Because the Bible Tells Me So": *Manifest Destiny and American Indians*, 9 ST. THOMAS L. REV. 37, 43 n.31 (1996); Wiessner, *supra* note 64, at 574.

71. Getches, *supra* note 24, at 1577 n.15 (citing Calvin's Case, 77 Eng. Rep 377, 398 (K.B. 1608) ("All infidels are in law *perpetui inimici* . . . And upon this ground there is diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel.")); SMEDAL, *supra* note 45, at 32; see also *supra* Part I.C (describing the Inuit's historical sovereignty claim).

72. Youngblood Henderson refers to this as the "civilization savage dualism of colonial thought." Youngblood Henderson, *supra* note 63, at 246.

73. Campbell, *supra* note 14, at 109 (noting the additional problem of the different concepts of "property" to American aborigines and Europeans). See also *infra* notes 85-87 and accompanying text, and note 97.

agricultural settlements quickly superseded the trading relationships. Settlers stripped bands of their lands and pushed the natives westward.<sup>74</sup> Individual bands formed alliances with either of the European powers, depending on criteria unique to each tribe or band.<sup>75</sup> Following France's loss to England in the French and Indian War, however, the French withdrew from Canada and the English obtained a monopoly on the future development of aboriginal relations and laws.<sup>76</sup> More importantly, within a year of the war's end, the British Crown issued the Royal Proclamation of 1763.<sup>77</sup>

Termed "Magna Carta of Indian Rights" by some,<sup>78</sup> the Proclamation set aside, or "reserved," aboriginal lands west of the Appalachians to the Mississippi River, and north from the Gulf of Mexico to beyond the Great Lakes. This was not the first reservation of lands to aborigines,<sup>79</sup> but was certainly the largest to that time and aimed in part to stop settler exploitation of aborigines.<sup>80</sup> The Proclamation firmly entrenched the idea that a solution to the "Indian problem" could be had by segregating natives and Europeans into different jurisdictions.<sup>81</sup> The American Revolution limited the Proclamation's effect south of the Great

74. See DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* 2-5 (Wash. Sq. Press 1981); Kersey, *supra* note 55, at 430.

75. GREEN, *supra* note 67, at 24-28; Wiessner, *supra* note 64, at 570; Youngblood Henderson, *supra* note 63, at 246.

76. GREEN, *supra* note 67, at 28. The French and Indian War was somewhat of a war by proxy, being the North American version of Europe's Seven Years War. The peace treaty ending this war stipulated that France's aboriginal allies were not to be punished or removed from their lands. INAC, *Canadian Indians: french.html*, *supra* note 68.

77. Royal Proclamation of 1763, George III (U.K.).

78. Bill Henderson, *Virtual Law Office* (visited Oct. 2, 1996) <<http://www.bloorstreet.com/200block/brintro.htm#45>> [hereinafter Henderson, *Virtual Law Office*].

79. The first reservation was established in 1638 in the Colony of Connecticut, for the Quinnipiac tribe. BORDEWICH, *supra* note 9, at 115.

80. This goal, and its self-serving foundation, are explicitly revealed in the Proclamation's text:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes . . . who live under our Protection, should not be molested or disturbed in the Possession of such parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them as their Hunting Grounds. . . .

. . . and We do further declare . . . to reserve under our Sovereignty, Protection, and Dominion, for the use of said Indians, all the lands [not within previously described colonial boundaries, or belonging to the Hudson's Bay Company].

Royal Proclamation of 1763, *supra* note 77. The Proclamation voided many existing small-scale (single landowner) land grants in the trans-Appalachian region and enjoined future grants and purchases there. *Id.*; see Wiessner, *supra* note 64, at 570.

81. BORDEWICH, *supra* note 9, at 116 ("Defiant settlers for the most part ignored the proclamation, but it had established ethnic separation for the first time as the keystone of government policy.").

Lakes, where at any rate it had been neither well received nor well enforced.<sup>82</sup> In Canada however the Proclamation continues to have substantive effect,<sup>83</sup> and is still cited by aboriginal leaders as a source of their aboriginal title to lands.<sup>84</sup>

The third major impact of this colonial period, and one ultimately tied to the use of land reservations as a policy tool, was the treaty-making process. The Spanish were the first to make treaties with American aborigines, but it was the British who developed them into a complex system for interacting with the aboriginal bands.<sup>85</sup> Treaties were used for "the subjugation of the indigenous peoples" through acquiring land,<sup>86</sup> securing allegiance, and regulating trade.<sup>87</sup>

These treaties can be considered as comparable, both normatively and textually, to contemporaneous treaties between European states.<sup>88</sup> This view was recognized by the U.S. Supreme Court as early as 1832.<sup>89</sup> Others note that the original intent of the European states were to treat aboriginal bands as equals at the negotiating "table." Recently the United Nations has tentatively recognized that "indigenous peoples" should be treated with the same "honour and respect" as independent states in the negotiation and enforcement of treaties.<sup>90</sup> These interpretations on the practice of treaty making support the historical strand of the aboriginal sovereignty claim.<sup>91</sup>

Nevertheless, as the process of treaty making with aboriginal bands was continued by the United States, and later Canada, the nature of the treaties changed. These nineteenth-century tribal treaties do not carry the same force under international law as do seventeenth- and eighteenth-century interstate treaties; the latter were "regular alliance and friendship treaties," while the

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82. *Id.* at 116.

83. Campbell, *supra* note 14, at 106; INAC, *The Canadian Indians* (visited Nov. 22, 1996) <<http://www.inac.gc.ca/pubs/indian/rights.html>> [hereinafter INAC, *Canadian Indians: rights.html*].

84. *See infra* note 111.

85. Wiessner, *supra* note 64, at 570. The Spanish and Portuguese use of the treaty process was minimal; they instead relied on Papal Bulls for their New World authority. *Id.* at 569 n.9 & 570 n.15. Other European states that engaged in the treaty process with aboriginal bands were France, Sweden, and The Netherlands. *Id.* at 569 n.12; *see also supra* note 64.

86. That is, acquiring title to land, as opposed to acquiring territory. *See* NORTHWEST ORDINANCE OF 1787 § 8 (U.S.) (providing for laying out of counties, townships, etc, in "parts of the district in which the Indian titles shall have been extinguished"); *see also supra* notes 70-73 and accompanying text.

87. Wiessner, *supra* note 64, at 569. Treaties affecting aboriginal rights and populations were also entered into between Europeans powers, and between European states and the United States. Campbell, *supra* note 14, at 104-05; *see, e.g., supra* note 76.

88. Wiessner, *supra* note 64, at 574-76.

89. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 550 (1832).

90. *See* Wiessner, *supra* note 64, at 568 (quoting article 36 of the 1993 Draft Declaration on the Rights of Indigenous Peoples).

91. *See* Youngblood Henderson, *supra* note 63, at 246 ("From the Eurocentric viewpoint, the European Crowns recognized the sovereignty of the First Nations; however, from a First Nations' perspective, the European Crowns recognized the inherent self-determination of Aboriginal peoples.").

former were negotiated "to regularize and channel the removal of Indians from their traditional vast hunting and fishing grounds to ever smaller . . . reservations."<sup>92</sup> In addition, the outlook of this later period may have affected how nineteenth-century aboriginal-policy administrators approached their job. In 1886 the Commissioner of Indian Affairs stated that "[i]t is perfectly plain to my mind that the treaties never contemplated the un-American and absurd idea of a separate nationality in our midst, with power as they may choose to organize a government of their own."<sup>93</sup>

The use of the practices detailed in this section shows how, even in the early colonial period, the European states had entrenched the idea that North American aborigines could be treated both as sovereign, for purposes of securing trade agreements and title to lands, and as unorganized populations of a *res nullius*, on whom the Europeans could legitimately impose their own ideas of governance and law.

### *B. First Nations in Canada*

The British Parliament created the Canadian confederation with the British North America Act of 1867 (now termed the Constitution Act, 1867).<sup>94</sup> The act established the form and power of the federal government, and the powers of the provinces within the federal system, intending Canada to have a strong, centralized federal government.<sup>95</sup> As regards aboriginal rights, the Act gave legislative jurisdiction over aborigines and their lands to the new federal government.<sup>96</sup> Prior to confederation, the provinces had continued the treaty-making process noted above, to purchase (secure title to) the lands along the eastern Great Lakes' shores — aboriginal title that had been reserved under the Royal Proclamation of 1763.<sup>97</sup> These preconfederation treaties include the so-called "Robinson Treaties" of the 1850s, which covered lands from Ontario to Lake Superior.<sup>98</sup> Using the Robinson Treaties as a model, the Canadian federal

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92. Wiessner, *supra* note 64, at 576-80; *see also* Campbell, *supra* note 14, at 103, 107 (stating that "peace and friendship treaties made prior to confederation" are categorically distinguishable from later treaties with the Canadian federal government, *see infra* Part II.B); Youngblood Henderson, *supra* note 63, at 248-49 (distinguishing "Georgian treaties made with 'nations and tribes of Indians'" from "Victorian treaties [made with] . . . 'Her Majesty's Indian subjects'").

93. BORDEWICH, *supra* note 9, at 118.

94. British North America Act of 1867 (Constitution Act, 1867), 30 & 31 Victoria, ch. 3 (U.K. 1867).

95. Henderson, *Virtual Law Office*, *supra* note 78, at 1 of 19.

96. Constitution Act, 1867, *supra* note 94, § 91 (reserving legislative authority over "Indians and Lands reserved for the Indians" to Parliament).

97. INAC, *Canadian Indians: rights.html*, *supra* note 83. Again, this title acquisition should be seen as distinct from territorial acquisition; in the provinces' minds (as in the minds of the British and the U.S. government) the territory was already subject to their nonaboriginal sovereignty). *See supra* notes 70-73, 85-87 and accompanying text.

98. INAC, *The Canadian Indians* (visited Nov. 22, 1996) <<http://www.inac.gc.ca/pubs/>



government negotiated the famous "Numbered Treaties" to take title to aboriginal lands from the Great Lakes to the Rocky Mountains, and northwestward to the Mackenzie River delta in the Yukon.<sup>99</sup> The government negotiated the eleven Numbered Treaties in two waves. Treaties One through Seven cover territory below the 55th parallel and east of the Canadian Rocky Mountains (with certain exceptions), and were negotiated between 1871 and 1877. Treaties Eight through Eleven took title to what is today the Yukon Territory and the western Northwest Territories, and were negotiated between 1899 and 1921.<sup>100</sup> In exchange for surrendering aboriginal title to their lands, the federal government agreed to create reserves for signatory First Nations, based on the population of the bands covered by each treaty.<sup>101</sup> Certain other rights were granted in some treaties,<sup>102</sup> though the First Nations had little say in the terms included and the size of reserves established.<sup>103</sup>

At the same time as it assigned aboriginal jurisdiction to the federal government, the Constitution Act, 1867 also assigned all Crown lands and resources to the provinces, subject to any existing trusts.<sup>104</sup> Although this "trust" qualification on the assignment of Crown lands to the provinces included any reserved aboriginal lands, most reserves were negotiated not only after the enactment of the Constitution Act, 1867, but also after the creation of the prairie provinces,<sup>105</sup> and the addition of territory to existing provinces.<sup>106</sup> Thus in

indian/rob.html>. The Robinson Treaties were named for their negotiator. *Id.*

99. INAC, *The Canadian Indians* (visited Nov. 22, 1996) <<http://www.inac.gc.ca/pubs/indian/treat.html>>.

100. *Id.*

101. INAC, *The Canadian Indians* (visited Nov. 22, 1996) <<http://www.inac.gc.ca/pubs/indian/major.html>> [hereinafter INAC, *Canadian Indians: major.html*]; TLE, *A Debt To Be Paid - Chapter 2* (visited Dec. 03, 1996) <<http://www.abinfohwy.ca/tlecomm/debt3.htm>>, at 1 of 2 [hereinafter TLE, *A Debt To Be Paid Ch. 2*]. Most treaties promised 32 acres of land per member of the band included; a few raised this figure to 128 acres of land per member. *Id.*, at 2 of 2.

102. "The promise of schools on reserve in many [t]reaties is seen by First Nations as a commitment to provide education . . . the promise of a medicine chest in one Treaty has been held by the courts to be a promise of health services." Henderson, *Virtual Law Office*, *supra* note 78, at 2 of 19.

103. TLE, *A Debt to be Paid Ch. 2*, *supra* note 101, at 1 of 2.

104. Constitution Act, 1867, *supra* note 94, § 109.

105. A year after confederation, Rupert's Land (the lands of Hudson's Bay Company) was purchased by the British Parliament, at Canada's request, and added to the confederation. Rupert's Land Act, 1868, 31-32 Victoria ch. 105 (U.K.); *see also* Temporary Government of Rupert's Land Act, 1869, 32-33 Victoria, ch. 3 (Can.) (providing for an ad hoc government for the lands of Hudson's Bay Company, in expectation that they would soon be joined to the Dominion of Canada). From this and other adjacent lands, new provinces were created in 1870 (Manitoba) and 1905 (Alberta and Saskatchewan). Manitoba Act of 1870, 33 Victoria ch. 4 (1870) (U.K.); Alberta Act, 4 & 5 Edw. 7, ch. 3 (1905) (Can.); Saskatchewan Act, 4 & 5 Edw. 7, ch. 42 (1905) (Can.). British Columbia, the aborigines within which have never entered into treaties, Morse, *supra* note 8, at 676, was added to the confederation in 1871. INAC, *Canadian Indians: major.html*, *supra* note 101. This agreement to enter the Dominion hinged on fulfillment of a promise by the federal government to build a trans-continental railway — a further pressure on

many cases the western provinces, and the northern elements of the older eastern provinces, were delineated *before* clarification of the outstanding, underlying aboriginal title. It was not until 1888 that this contradiction was clarified, in a decision which eroded the federal government's power over aboriginal policy.<sup>107</sup> The British Privy Council held that, despite the Numbered Treaties and the Royal Proclamation of 1763, provincial title "under[ies] the Indian title," so that the former becomes "*plenum dominium* whenever that [Indian] title was surrendered or otherwise extinguished."<sup>108</sup> As a result, the Canadian government now needs provincial approval to create reserves by treaty. In addition, the provinces must agree to any sale of existing reserve lands to non-Indians.<sup>109</sup> These restrictions on federal power, along with statutory restraints,<sup>110</sup> impact First Nations' exercise of self-determination, hindering the establishment of reserves promised to them by the Numbered Treaties and limiting their ability to control and access their own land base.

The outstanding status of many Numbered Treaty obligations in the prairie provinces shows the extent of these impacts on aboriginal rights. For example, one First Nation advocacy group in Manitoba claims that, as of 1977 (over 100 years after enactment of the Manitoba Act), only 2327 square kilometers of reserves had been created in Manitoba, while claims to an additional 4978 square kilometers remained outstanding.<sup>111</sup>

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the aboriginal use of, and title to, lands in the prairie region. *Id.*

106. Territory was added to Ontario in 1889, to Québec in 1896, and to Manitoba, Ontario, and Québec in 1912. Canada (Ontario Boundary) Act, 1889, 52-53 Victoria, ch. 28 (U.K.); The Quebec Boundaries Extension Act, 1912, 2 George V, ch. 45 (U.K.).

107. Henderson, *Virtual Law Office*, *supra* note 78, at 5 of 19; *see also* Campbell, *supra* note 14, at 108 ("First Nations were ironically dependent on the province transferring title to the federal government, thereby giving the provincial government a strong hand in Native affairs.").

108. *R. v. St. Catherine's Milling & Lumber Co.*, [1888] 14 App. Cas. 46 (P.C.).

109. Henderson, *Virtual Law Office*, *supra* note 78, at 5 of 19.

110. *See* Natural Resources Transfer Agreement of 1930, 28 George V, ch. 1 (Can.) (transferring resource administration to the provinces, with two ramifications for aboriginal rights — first, it affected the legal analysis to be applied to existing treaty-based rights, and second, it altered with whom First Nations needed to negotiate for the preservation of rights in the future). The Supreme Court has held that the harvesting rights of the prairie provinces' First Nations ended in 1930 with the resources agreements, although aborigines had not been a part of the transfer negotiations. *R. v. Horseman*, [1990] 1 S.C.R. 901 (Can.). Note that the decision in this case follows in time the adoption of a more liberal interpretation of aboriginal rights, under the Charter of Rights and Freedoms. *See infra* Part II.C.

111. TLE, *A Debt to be Paid — Chapter 4* (visited Dec. 3, 1996) <<http://www.abinfohwy.ca/tlecomm/debt5.htm>> [hereinafter TLE, *A Debt To Be Paid Ch. 4*]. Despite transfer of Canada's reserve establishment obligation to the provinces in 1930, via the Natural Resources Transfer Agreement, *supra* note 110, the question of whether or not treaty land entitlement claims are outstanding is determined between the First Nation in question and the federal government. TLE, *A Debt To Be Paid Ch. 4, supra*. Signatory bands to other Numbered Treaties have established groups to help assert and protect their treaty rights against these provinces, including rights solidified by the Royal Proclamation of 1763. *See, e.g.*, Confederacy of Treaty 6 First Nations, *Treaty Six Mandate* (visited Oct. 31, 1996) <<http://www.treaty6.org/mandate/#mandates>>;

The area of Manitoba as a whole is 548,495 square kilometers.<sup>112</sup> Through the mid-1970s the other prairie provinces, Alberta and Saskatchewan, faced similar outstanding land claims. Unfulfilled claims remain in Alberta, but Saskatchewan reached agreement with its First Nations in 1976.<sup>113</sup>

### C. Modern Canadian Aboriginal Policy

Today the Canadian federal government has two primary expressions of aboriginal policy: the Indian Act and the *Federal Policy Guide* produced by the Ministry of Indian and Northern Affairs Canada. In addition the federal and provincial governments are constrained by sections 25 and 35 of the Constitution Act, 1982.

#### 1. The Charter of Rights and Freedoms

The Canadian Parliament has had clear and unrestricted right to amend its constitution for less than two decades; only in 1982 did the British Parliament "repatriate" the Canadian constitution.<sup>114</sup> The most important development for aboriginal rights in this constitutional action was the inclusion of section 25 in the Charter of Rights and Freedoms, which consists of the first part of the Constitution Act, 1982, and section 35, in the second part of the Act. Section 25 states that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada,"<sup>115</sup> including the Royal Proclamation of 1763 and any current or future land claims agreements.<sup>116</sup> Section 35 provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."<sup>117</sup> All aborigines, including the mixed-ancestry Métis,<sup>118</sup> are

Treaty 7 Tribal Council, *Treaty 7 Home Page* (visited Dec. 12, 1996) <<http://www.treaty7.org>>; see *infra* note 203 for a discussion of the creation of Manitoba to address aboriginal rights claims.

112. Statistics Canada, *Land and Freshwater Area* (visited Apr. 20, 1997) <<http://www.stat.can.ca/english/Pgdb/Land/Geography/phys01.htm>>.

113. Government of Saskatchewan, *Saskatchewan Indian and Metis Affairs Secretariat - Mandate* (visited Dec. 15, 1996) <<http://www.sasknet.com/govt/govt/indmet/mandate.htm>>; Government of Saskatchewan, *Government News Release 096* (visited Dec. 15, 1996) <<http://www.sasknet.sk.ca/saskgov/newsrel/1996Mar/096.96031406.html>>. The provincial government finally implemented this agreement in 1993. TLE, *A Debt To Be Paid — Chapter 6* (visited Dec. 03, 1996) <<http://www.abinfohwy.ca/tlecomm/debt7.htm>>.

114. Constitution Act, 1982 (U.K.). The Canadian constitution is actually a collection of acts passed by the British, and now Canadian, parliaments between the Quebec Act of 1774 and the present. See, e.g., *Canadian Constitutional Documents* (visited Dec. 2, 1996) <<http://insight.dcss.mcmaster.ca/org/efc/pages/law/cons/constitutions/canada/english/cons.html>> (reproducing a schedule attached to the Constitution Act, 1982, that serves as the authoritative list of the documents that make up the Canadian constitution).

115. Constitution Act, 1982 § 25 (U.K.).

116. Henderson, *Virtual Law Office*, *supra* note 78, at 5 of 19.

117. Charter of Rights and Freedoms, § 35(1). As one Canadian author noted, "[Section 35] affirms both customary indigenous rights (Aboriginal rights) and positive law rights (treaty rights)

included under this section. Furthermore, aboriginal rights are not to be adjudicated as if frozen in time in 1982, but rather as they are further regulated or negotiated.<sup>119</sup> Associated section 35.1 insures that modern land claims agreements are considered treaties for the purposes of the section.<sup>120</sup> Finally, although section 35 is not within the Charter of Rights and Freedoms *per se*, section 35.1 restricts changes to section 35 by requiring consultation with aboriginal leaders and a constitutional conference before changes can be made.

Since the passage of section 35 and the Charter of Rights and Freedoms, the Court has generally (though not consistently) been more liberal in its treaty interpretations.<sup>121</sup> Previously the Canadian Supreme Court had had an inconsistent history in interpreting treaties. Sometimes treaties were found to extinguish rights despite procedural or even substantive errors;<sup>122</sup> alternating with these decisions were others in which the court upheld protected rights.<sup>123</sup> In addition, until 1990 aboriginal rights could be regulated by any level of government, including the provinces.<sup>124</sup> Because of the ongoing uncertainties regarding the reasoning the court will apply, and the court's awareness of the regional issues threatening Canadian unity in the western provinces, the judicial branch of the federal government cannot be said to be the best choice for the

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as enduring sources of constitutional law." Youngblood Henderson, *supra* note 63, at 244.

118. The Métis are people classified separately from Indians or the Inuit. Descendants of aborigines and European traders, they formed a large part of the aboriginal population of the prairie region, where they "developed a lifestyle that combined the hunting traditions of nomadic Indians with the more settled ways of European newcomers. INAC, *The Canadian Indians* (visited Nov. 22, 1996) <<http://www.inac.gc.ca/pubs/indian/metis.html>>.

119. *R. v. Sparrow*, [1990] 70 D.L.R.4th 385 (Can.) (activities integral to aboriginal survival are included among the bundle of aboriginal rights).

120. Charter of Rights and Freedoms, § 35.1; *see also infra* Part II.E (describing land claims agreements generally).

121. *R. v. Simon*, [1985] 24 D.L.R.4th 390 (Can.) ("[T]reaties and statutes dealing with Indians should be given a fair, large and liberal construction and doubtful expressions resolved in favour of the Indians, in the sense in which they would be naturally understood by the Indians."); *accord R. v. Nowegijick*, [1983] 144 D.L.R.3d 193 (Can.). *But cf. R. v. Howard*, [1994] 2 S.C.R. 299 (Can.) (favorable treaty interpretation does not apply when the aborigines in question are urbanized and educated, despite their ancestors' having been otherwise; here the treaty had not been authorized and was not ratified by the Governor in Council). *See also Campbell*, *supra* note 14, at 102 ("[The] tension between national sovereignty and Native sovereignty is a continuing theme from the earliest benchmark cases . . . to current cases where the extent of aboriginal rights and sovereignty are still at issue").

122. *Ontario v. Bear Island Found.*, [1991] 2 S.C.R. 570 (Can.) (band ceded aboriginal title by adhesion, when there had been no discussion of adhesion or an adhesion document); *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 (Can.) (intention of Parliament, not Indians, determines treaty interpretation of aboriginal rights that were negotiated away).

123. *R. v. Sioui*, [1990] 1 S.C.R. 1025 (Can.) (recognizing as a treaty, with associated aboriginal rights, incomplete documents that were not ratified); *R. v. White & Bob*, [1966] 52 D.L.R.2d 481 (Can.) (same).

124. Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, STAN. L. REV. 1311, 1320 (1993).

advancement of aboriginal rights.<sup>125</sup> First Nations have had far more consistent success through negotiations directly with the federal government and the provinces.<sup>126</sup>

## 2. The Indian Act

The Indian Act<sup>127</sup> regulates how the federal government interacts with Indian and Métis (but not Inuit)<sup>128</sup> aborigines, as well as how First Nations may, if authorized, govern some internal matters.<sup>129</sup> Enacted in 1876 by the Canadian Parliament, its original sections were quite restrictive of aboriginal rights.<sup>130</sup> For example, provisions included the involuntary "enfranchisement" of educated aborigines — meaning that Natives who went to college or obtained professional degrees lost their Indian status. Parts of the original Indian Act also allowed judges to void urbanized reserves, and limited the due process rights of bands whose reserves were taken for public use.<sup>131</sup> In recent decades the Indian Act's strictures have been loosened, in several waves of reform.<sup>132</sup> Looking at aboriginal self-determination specifically, however, the Act still contains several interesting sections.

The Indian Act gives the Minister of Indian Affairs and Northern Development broad regulatory powers over aboriginal bands: "fur-bearing animals, fish and other game on reserves," "the destruction of noxious weeds and the prevention of . . . insects, pests or diseases," transportation, livestock protection, "pool rooms, dance halls, and other places of amusement," "to . . . control the spread of diseases," medical services generally, "compulsory hospitalization," housing inspection, overcrowding prevention, "sanitary conditions," and "construction and maintenance of boundary fences."<sup>133</sup> The Minister may also force band expenditure for items such as infrastructure maintenance.<sup>134</sup> Band councils are given authority to make bylaws covering similar (but not identical) areas,<sup>135</sup> although such bylaws must be "not

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125. Campbell, *supra* note 14, at 110 (noting the Canadian Supreme Court's "unwillingness to grapple with self-government"); Morse, *supra* note 8, at 678.

126. See Morse, *supra* note 8, at 673, 676-77; see also *infra* Part II.D.

127. Indian Act, R.S.C. ch. I-5 (1985) (Can.); *id.* ch. 17 (1990) (Can.).

128. *Id.* § 4(1).

129. INAC, *The Canadian Indians* (visited Nov. 22, 1996) <<http://www.inac.gc.ca/pubs/indian/1951.html>> [hereinafter INAC, *Canadian Indians: 1951.html*].

130. Bill Henderson, *Henderson's Annotated Indian Act* (visited Oct. 31, 1996) <<http://www.bloorstreet.com/200block/sindact.htm>>, at 1-2 of 73 [hereinafter Henderson, *Indian Act*].

131. *Id.*

132. Revisions to the Indian Act began in 1951. *Id.*; INAC, *Canadian Indians: 1951.html*, *supra* note 129. For example, the enfranchisement provisions, see *supra* text accompanying note 131, were removed, and previously enfranchised Indians were restored to their previous status. Bill Henderson, *Indian Act*, *supra* note 130, at 2 of 73.

133. Indian Act, *supra* note 127, § 73(1).

134. *Id.* § 34(1).

135. *Id.* §§ 81(1), 83(1).

inconsistent with" the Indian Act or ministerial regulation.<sup>136</sup> The Minister also has power of disallowance over bylaws,<sup>137</sup> and the act's regulations control the form of, and election to, band councils.<sup>138</sup> The supremacy of provincial laws over each province's First Nations and their members is written into the act,<sup>139</sup> while the problem of provincial veto over reserve establishment is codified as well.<sup>140</sup>

Such restrictions shackle First Nations' attempts to exercise internal sovereignty and self-determination. The Indian Act inadequately deals with questions of legitimacy of governance and popular consent to that governance, from the aboriginal perspective.<sup>141</sup> Through its grants of oversight to governmental ministers, "Canada [has] denied the legal existence of First Nations' sovereignty independent of delegated authority. Conceptually, any power enjoyed by First Nations to pass laws and exercise jurisdiction over their internal affairs was viewed by Canadian law as a delegation or grant of authority from the Canadian state."<sup>142</sup>

### 3. *The Federal Policy Guide: Aboriginal Self-Government*

The current government has also addressed aboriginal self-government in its *Federal Policy Guide: Aboriginal Self-Government (Policy Guide)*. That document makes supportive statements towards aboriginal sovereignty, yet at the same time points to some of the restrictions on native sovereignty inherent in any federal system. Although in its introduction the government "recognizes the inherent right of self-government as an existing right within Section 35 of the Constitution Act, 1982,"<sup>143</sup> the first part of the *Policy Guide* places a strong

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136. *Id.* § 82(2).

137. *Id.* § 82(1).

138. *Id.* §§ 74-80; see also Wiessner, *supra* note 64, at 572 n.27 (noting similar external, federal government restrictions on potential aboriginal self-determination in the United States: "So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law within whose territory the tribe occupies the land, and so far only as that law recognizes it.").

139. Indian Act, *supra* note 127, § 88. This provincial power stands in notable contrast to the powers of states over Indian tribes in the United States. See *infra* Part III.B.

140. *Id.* § 37(1). Note that some provinces have begun to work more closely with their First Nations, even to the point of recognizing their right to self-government. *Ontario and First Nations Discuss Aboriginal Constitutional Change*, CAN. NEWSWIRE, Jan. 15, 1992; Ken MacQueen, *Capturing a Dream*, MACLEAN'S, Dec. 9, 1985, at 12 (noting "bold experiment[s] in native self-government" in British Columbia and Ontario).

141. Youngblood Henderson, *supra* note 63, at 245 ("Without a balance between Aboriginal perspectives and the Eurocentric view, existing federalism reflects political domination and oppression."). But see Morse, *supra* note 8, at 677 (stating that the Indian Act "is often not followed in practice").

142. Macklem, *supra* note 124, at 1320.

143. INAC, *Federal Policy Guide: Aboriginal Self-Government* (visited Oct. 31, 1996) <<http://www.inac.gc.ca/pubs/selfgov/policy.html>>, at 3 of 14 [hereinafter INAC, *Federal Policy Guide*]; see *infra* text at notes 114-19 for a discussion of § 35 and the Charter of Rights and Freedoms generally.

qualification on this right:

The inherent right of self-government does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states. On the contrary, implementation of self-government should enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society.<sup>144</sup>

Later the *Policy Guide* further reduces the flexibility available to First Nations, stating that "exercising the inherent right of self-government will operate *within the framework of the Canadian Constitution*. . . in harmony with jurisdictions that are exercised by other governments."<sup>145</sup> Thus, within the Canadian federation the exercise of aboriginal self-government rights does not mean that the First Nations are free of federal, or even provincial, constraints:

As a right which is exercised within the framework of the Canadian Constitution, the inherent right will not lead to the automatic exclusion of federal and provincial laws, many of which will continue to apply to Aboriginal peoples or will co-exist alongside validly enacted Aboriginal laws.

. . . Government believes that all agreements, including treaties, should establish rules of priority by which such conflicts can be resolved. . . . [N]egotiated rules of priority may provide for the paramountcy of Aboriginal laws, but may not deviate from the basic principle that those federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws.<sup>146</sup>

Ultimately the subject matters listed in the *Policy Guide* as open to negotiation for First Nation control under self-government agreements<sup>147</sup> are quite restricted, and read like the powers of a municipality — health, education, housing, transportation, policing, zoning, resource management, taxation, etc.<sup>148</sup> Provincial-level powers, such as marriage and divorce laws, environmental protection, the penal system, and labor issues, are specifically exempted from aboriginal oversight, as are federal-level issues such as international relations, defense, economic policy, communications, emergency powers, etc.<sup>149</sup>

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144. INAC, *Federal Policy Guide*, *supra* note 143, at 4 of 14.

145. *Id.* (emphasis added).

146. *Id.* at 7 of 14.

147. See, e.g., Yukon First Nations Self-Government Act ch. 35 (1994).

148. INAC, *Federal Policy Guide*, *supra* note 143, at 4 of 14; *cf. supra* notes 133, 135 (discussion the powers of the federal government and aboriginal bands under the Indian Act); *infra* notes 269-72 and accompanying text (discussing the U.S. Indian Reorganization Act).

149. INAC, *Federal Policy Guide*, *supra* note 143, at 5 of 14. Compare this with the

A federal commission looked specifically at the question of aboriginal self-government in 1983. That commission issued 58 recommendations for creating a new relationship between the Canadian government and the First Nations, adding that "an essential element of this relationship must be Indian self-government."<sup>150</sup> Closely linked to effective self-government was Native control of a strong economic base.<sup>151</sup> Yet just as the discussions of the Indian Act showed,<sup>152</sup> government limits on sovereignty and self-determination operate to restrict the exercise of that right even before First Nations can enter into negotiations for the power to exercise it. In doing so the Indian Act and the *Policy Guide* limit the utility of sections 25 and 35 of the Constitution Act, 1982, skirting the constitutional protections by defining certain powers and activities as being beyond the scope of aboriginal authority.

#### 4. Land Claims Agreements

The *Policy Guide* opens with a preface by the ministers in charge of aboriginal affairs, in which they state that "[t]he objective of the federal government is clear. Significant change must be made to ensure Aboriginal peoples have greater control over their lives. The most just, reasonable and practical mechanism to achieve this is through negotiated agreements."<sup>153</sup> Today these land claims agreements, rather than formal treaties, are the most common form of Canadian government/First Nation interaction at the federal level.<sup>154</sup> The first land claims agreement was reached with the James Bay Cree and the Northern Québec Inuit in 1975.<sup>155</sup> This agreement grew out of protests by the northern Québec aborigines over the province's plans to develop the massive hydroelectric potential of the region.<sup>156</sup> Signatories to the James Bay

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negotiated solution to the Inuit self-determination claims, which was the creation of a territory on an equal footing (including legislative powers) with existing territories. See *infra* Part II.E.

150. INAC, *The Canadian Indians* (visited Nov. 22, 1996) <<http://www.inac.gc.ca/pubs/indian/self.html>> [hereinafter INAC, *Canadian Indians: self.html*]; see also Howard Schneider, *It Put Off Treaty, So British Columbia's Up for Grabs*, WASH. POST, Aug. 21, 1996, at A01 (noting the recent release of a 4000 page Canadian government study on aboriginal relations with the federal government).

151. INAC, *Canadian Indians: self.html*, *supra* note 150. Thus a bureaucratic process achieved in principle results similar to those achieved in fact through negotiations with the Cree and Inuit over the proposed HydroQuébec Project several years earlier. See *infra* Part II.D.

152. See *supra* notes 141-42 and accompanying text.

153. INAC, *Federal Policy Guide*, *supra* note 143, at 1 of 14. This position builds on an earlier government document entitled *In All Fairness: A Native Claims Policy, Comprehensive Claims* that was issued in 1981. Kersey, *supra* note 55, at 436.

154. See also *infra* Part III.C (describing U.S. land claims settlement legislation).

155. Henderson, *Aboriginal Law*, *supra* note 11, at 7 of 19.

156. HydroQuébec Environnement et Collectivités, *The Inuit* (visited Oct. 2, 1996) <<http://envir.hydro.qc.ca/coll/ingen01a.html>>. The Crees began challenging Québec's hydroelectric development plans through judicial action, winning an important decision in 1973 that was based on the Québec Boundary Extension Act of 1912 (see *supra* note 106). INAC, *The Canadian Indians* (visited Nov. 22, 1996) <<http://www.inac.gc.ca/pubs/indian/agree.html>>. See generally



and Northern Québec Agreement included the provincial and federal governments, the Grand Council of the Cree of Québec, the Northern Québec Inuit Association, and three provincially chartered energy corporations. The agreement covers a total of 1,066,000 square kilometers,<sup>157</sup> an area equal to roughly one-ninth of Canada's entire land area, and over three-fourths of Québec.<sup>158</sup> Six subsequent agreements have dealt with localized issues such as water levels and environmental remediation.<sup>159</sup>

Although it has not solved many of the First Nations' problems vis a vis the HydroQuébec Project,<sup>160</sup> the James Bay and Northern Québec Agreement has proved a popular model for First Nations seeking to reach agreements with provincial and federal officials over Native rights to resources and settling of aboriginal title issues. In the last twenty years ten major land claims agreements have settled aboriginal title to an additional 560,000 square kilometers of land.<sup>161</sup>

#### *D. The Inuit and the Arctic Region*

The Inuit are not only treated differently under Canadian law, as compared

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*Arctic Circle: The Crees of Northern Québec* (visited Oct. 2, 1996) <<http://www.lib.ucon.edu/ArcticCircle/HistoryCulture/Cree/>> (providing links to 16 other sources of information on the Cree, the land claims agreement, and the northern Québec region).

157. James Bay and Northern Québec Agreement, § 2, art. 2.1; *The Inuit*, *supra* note 156. Under the original agreement, the Crees, numbering approximately 12,000, received C\$169 million, clear title to 14,025 square kilometers of land, resource rights to an additional 966,575 square kilometers, and some control over their internal development, including education and health services, in exchange for their surrender of their aboriginal title of the lands to Québec and Canada. The Inuit, numbering approximately 7000, received C\$94 million, clear title to 8106 square kilometers, resource rights to an additional 978,247 square kilometers (896,650 of that shared with the Crees), as well as similar controls over their internal development, in exchange for surrender of their aboriginal title. James Bay and Northern Québec Agreement, § 2, art. 2.1. The jointly administered land area is comparable in size of the Province of Alberta. *The Inuit*, *supra* note 156.

158. Statistics Canada, *Canadian Dimensions - Land and Freshwater Area* (visited Oct. 2, 1996) <<http://www.statcan.ca/documents/english/pgdb/land/geography/phys01.htm>>.

159. HydroQuébec Environnement et Collectivités, *The Crees* (visited Oct. 2, 1996) <<http://envir.hydrol.qc.ca/coll/crgen06a.html>>.

160. Robert R. Rodgers, *Power from the North: A Case Study of New York State's Regulatory Process for the Importation of Electricity from Quebec*, 6 GEO. INT'L ENVTL. L. REV. 683, 692-93 (1994) (discussing Cree social breakdown, environmental contamination, and ongoing litigation). See also Campbell, *supra* note 14, at 111 (arguing that the agreement is "more a statement of the rights of the James Bay hydro project than it is of the rights" of the Cree and Inuit.).

161. Morse, *supra* note 8, at 682. A recent example of this form of agreement between aboriginal bands and the federal government addresses the concerns of the Nisga'a in British Columbia. The Nisga'a received a settlement of C\$140 million for their claim to lands that now make up downtown Vancouver; other bands await negotiations over similar and larger claims. Schneider, *supra* note 150; see also Justice Canada, *Gwich'in Land Claim Settlement Act, c.53* (1992) (visited Dec. 12, 1996) <<http://canada.justice.gc.ca/folio>>.

to other aboriginal groups, but also are ethnically distinct. They are closely related to Arctic coastal people around the Arctic Ocean, living in what most would consider a cold and unforgiving climate<sup>162</sup> in an isolated, barren area.<sup>163</sup> Approximately 41% of the Northwest Territories' (NWT) residents speak a language other than French or English — presumably the Inuit language of Inuktituk. The figure rises to almost 75% in the eastern part of the NWT — the future Territory of Nunavut.<sup>164</sup>

The Inuit led a migratory hunting life, and even after Canada began asserting its sovereignty over the area in the early part of the twentieth century, the Inuit remained culturally isolated for several decades.<sup>165</sup> However, the combination of Cold War defense needs and the discovery of valuable minerals increased southern attention on the Inuit's land.<sup>166</sup> The federal government resettled the Inuit into permanent villages, opened a school system (English language only until the 1960s), and established a bureaucratic structure administered largely by outsiders.<sup>167</sup> Increasing education and communication with the outside world led to the Inuit realization of their disparate treatment, as compared to the First Nations further south, and to greater Inuit participation in municipal governments that the federal government had established.<sup>168</sup>

When the federal government announced that it would be willing to negotiate land claims settlement agreements with aboriginal groups in 1973, the Inuit soon organized a formal response. Early on the Inuit requests included the creation of an Inuit-run territory, and this was a major stumbling block until 1982.<sup>169</sup> In that year the NWT held a plebiscite, authorized by the territorial legislature, on whether the territory should be split as the Inuit proposed. A total of 57% of the territory's residents voted "yes"; within the proposed new territory, named "Nunavut,"<sup>170</sup> the "yes" votes were over 80%.<sup>171</sup> With the results in hand, the Inuit position was strengthened and, while continuing negotiations over the exact

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162. See Kersey, *supra* note 55, at 432 (noting "their location in the climatically and geographically inhospitable North").

163. A total of 80% of Nunavut's residents will live north of the treeline. *Mulroney Hails Nunavut Land Claims Agreement*, REUTERS FIN. SERV., May 25, 1993.

164. Statistics Canada, *Nunavut/Western NWT Fact Sheet* (visited Jan. 16, 1997) <<http://www.stats.gov.ca/Bureau/StatInfo/NunavutWest/FactSheet.html>>, at 3 of 6 [hereinafter *Nunavut/Western NWT Fact Sheet*].

165. Kersey, *supra* note 55, at 432.

166. See, e.g., Norman Chance, *In Pursuit of Progress: A Colonial Narrative* (visited May 4, 1997) <<http://www.lib.uconn.edu/ArcticCircle/HistoryCulture/progress.html>>; Peter Gizewski, *Military Activity and Environmental Security: The Case of Radioactivity in the Arctic* (visited May 04, 1997) <<http://www.carc.org/pubs/v21no4/military.htm>>.

167. Kersey, *supra* note 55, at 432-33.

168. *Id.* at 434.

169. *Id.* at 435-37.

170. "Nunavut" means "our land" in Inuktituk. *Id.* at 436.

171. *Id.* at 437-38.

wording of the land claims agreement and territorial act took another decade, the Inuit eventually achieved their goal.<sup>172</sup>

### *E. The Territory of Nunavut*

In 1993 the Inuit of the NWT and the Canadian federal government agreed to the most comprehensive land claims agreement ever reached in Canada.<sup>173</sup> Two acts, the Nunavut Land Claims Agreement (NLCA) and the Nunavut Act, were signed by the Prime Minister on May 25, 1993, and passed by the Canadian Parliament the following month.<sup>174</sup> The agreements were the product of over a decade of negotiations, dating back to before the Charter of Rights and Freedoms constitutionalized the protections afforded aboriginal rights.<sup>175</sup>

#### *1. The Nunavut Land Claims Agreement*

The NLCA<sup>176</sup> settled aboriginal title to a large percentage of Canadian territory — the Inuit received title to a minimum of 352,191 square kilometers,<sup>177</sup> or almost 4% of Canada.<sup>178</sup> The Inuit title is exclusive and alienable, subject only to certain public access easements<sup>179</sup> and certain government activities.<sup>180</sup> Federal, territorial, and local laws apply to this land as they would to any privately held land.<sup>181</sup> Thus the Inuit's title is distinguishable from the aboriginal title, held in trust by the Crown, that characterizes First Nation reserves in the prairie provinces and elsewhere.<sup>182</sup> In addition, Inuit corporations and the people themselves received a strong say in how several hundred thousand additional square kilometers are managed, over C\$1.1 billion

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172. *Id.* at 437-41. One major sticking point during this period came not from the federal government but from a separate aboriginal negotiating team representing the Dene and Métis people, who disagreed on where the boundary lines of the territory and the Inuit lands should be drawn. *Id.* at 438-40.

173. Because it is not a province, the NWT was not entitled to participate in the negotiations at the same level that, for example, Québec participated in the James Bay and Northern Québec Agreement.

174. *Canadian Financial Report*, REUTERS FIN. SERV., May 25, 1993, BC cycle; *see also Redrawing the Map*, MACLEAN'S, Dec. 30, 1991, at 9 (detailing the proposed land claims agreement and territorial secession); Brian Bergman, *A Test of Wills*, MACLEAN'S, May 4, 1992, at 20 (same).

175. Kersey, *supra* note 55, at 436-37; *see also* Nunavut Implementation Committee (NIC), *Footprints in New Snow*, ch. 1, at 2 of 8 (visited Sept. 19, 1996) <<http://www.nunanet.com/~nic/footprints01.html>> [hereinafter NIC, *Footprints in New Snow*].

176. Nunavut Land Claims Agreement, ch. 19 (1993) (Can.) [hereinafter NLCA].

177. *Id.* scheds. 19-2 to -7.

178. *Nunavut/Western NWT Fact Sheet*, *supra* note 164, at 1 of 6. In comparison, the Inuit make up less than one-tenth of one percent of Canada's population. *Id.*

179. NLCA, *supra* note 176, scheds. 21-1 to -3.

180. *Id.* sched. 21-4.

181. *Id.* § 2.12.1. The NLCA prevails over any conflicting federal, territorial, or local law, however. *Id.* § 2.12.2.

182. *Id.* § 2.17.1; *see also supra* notes 96-109, 133-40 and accompanying text.

in capital transfer payments, and additional shares of royalties from resource development on federally owned lands.<sup>183</sup>

In exchange the Inuit agreed to

(a) cede, release and surrender to Her Majesty The Queen in Right of Canada, all their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada; and

(b) agree, on their behalf, . . . not to assert any cause of action . . . or demand of whatever kind or nature which they ever had, now have or may hereafter have against Her Majesty . . . or any province, the government of any territory or any person based on any aboriginal claims, rights, title or interests in and to lands and waters described in Sub-section (a).<sup>184</sup>

This sweeping language is somewhat offset two paragraphs later, when the document states that

[n]othing in the Agreement shall:

(a) be construed so as to deny that Inuit are an aboriginal people of Canada or, subject to Section 2.7.1, affect their ability to participate in or benefit from any existing or future constitutional rights for aboriginal people which may be applicable to them;

(b) affect the ability of Inuit to participate in and benefit from government programs for Inuit or aboriginal people generally . . .

(c) affect the rights of Inuit as Canadian citizens . . . "<sup>185</sup>

Suits based on the failure of the Canadian government to follow through with its promises in the NLCA are also excepted from the general immunity described above.<sup>186</sup> The NLCA also does not affect the rights of other Canadian aboriginal populations in the same area, or the ability of the Inuit to negotiate separate agreements with such peoples.<sup>187</sup>

The NLCA established the Nunavut Planning Commission (NPC) to oversee the implementation of the agreement. At least half of the NPC must be residents of the lands covered by the NLCA.<sup>188</sup> NPC "establish[es] broad planning

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183. Kersey, *supra* note 55, at 449; INAC, *Nunavut Land Claims Agreement* (visited Oct. 31, 1996) <<http://www.inac.gc.ca/pubs/nunavut/index.html>>; see also Nunavut Planning Commission, *Nunavut Land Claim* (visited Oct. 2, 1996) <<http://npc.nunavut.ca/general/claim.html>> (summarizing the Agreement); Mary Williams Walsh, *Next Step: Canada's Inuit Reclaiming Ancestral Land*, L.A. TIMES, Sept. 15, 1992, at 1 (same).

184. NLCA, *supra* note 176, § 2.7.1.

185. *Id.* § 2.7.3.

186. *Id.* § 2.15.4.

187. *Id.* art. 40.

188. *Id.* § 11.4.7.

policies, objectives and goals . . . in conjunction with [the federal] Government" and "develop[s] . . . land use plans" to "fulfill the objectives of the Agreement."<sup>189</sup> To meet this objective the lands are divided by characteristics — possessing renewable resources, nonrenewable resources, "commercial value," or "archaeological, historical or cultural importance" — and thenceforth are to be managed to provide a "mix" of these characteristics.<sup>190</sup> The NPC also must "identify and prioritize" hazardous waste sites in the Inuit lands in conjunction with its general land use planning activities.<sup>191</sup> In conjunction with other sections of the NLCA,<sup>192</sup> this requirement could serve to restrict Inuit uses of their lands. Presumably, however, these restrictions were agreed upon during negotiations; indeed the NLCA states that the "primary purpose" of the lands is "to provide Inuit with rights in land that promote economic self-sufficiency of Inuit through time, in a manner consistent with Inuit social and cultural needs and aspirations."<sup>193</sup> In addition, the Inuit were able to choose the parcels to which they could retain mineral rights — in the end choosing 139 parcels containing a majority of several of Nunavut's most valuable mineral resources.<sup>194</sup>

Also ameliorating the review requirements embedded in the NLCA are certain "affirmative action"-like requirements. By 1996, all government organizations affected by the NLCA were to have prepared an "Inuit employment plan" to employ Inuit in government "at a representative level."<sup>195</sup> The NLCA defines this as "reflecting the ratio of Inuit to the total population of the Nunavut Settlement Area [the area covered by the NLCA]."<sup>196</sup> Determining who qualifies as an Inuit for these purposes, or any purpose under the NLCA, is left largely to the Inuit themselves, through a process set out in the NLCA<sup>197</sup> — quite a different situation from the ministerial control over First Nations' membership under the Indian Act.<sup>198</sup>

Additional agencies were created by the NLCA to oversee specific actions or resource bases in the region. One example is the "Nunavut Impact Review Board," a government agency responsible for assessing the environmental and socioeconomic impacts of proposed projects on the Inuit lands.<sup>199</sup> This

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189. *Id.* § 11.4.1.

190. *Id.* §§ 17.1.2-3.

191. *Id.* § 11.9.1.

192. The NLCA explicitly lists the land use planning principles and policies to be followed for these lands. *Id.* § 11.2.

193. *Id.* § 17.1.1; see also Nunavut Tunngavik Inc. [hereinafter NTI], *Nunavut Lands* (visited Jan. 16, 1997) <<http://www.lib.uconn.edu/ArcticCircle/SEEJ/nunavutmanage.html>> (NTI holds subsurface rights to Inuit-titled lands).

194. Kersey, *supra* note 55, at 449 (stating that the parcels contain over 80% of the territory's known copper, diamonds, gold, lead, silver, and zinc).

195. NLCA, *supra* note 176, § 23.4.1.

196. *Id.* arts. 4, 23.

197. *Id.* art. 35.

198. See *supra* notes 130-40 and accompanying text.

199. NLCA, *supra* note 176, § 12.2.1; see also Kersey, *supra* note 55, at 450 (also noting

includes recommending the establishment of a more formal environmental assessment panel under Canada's Minister of the Environment and exposing the proposed development to the strictures of the federal regulatory process<sup>200</sup> — again, however, a process that would have to be met for comparable privately held land.

## 2. *The Nunavut Act*

The Nunavut Act<sup>201</sup> goes even further than the NLCA in recognizing the Inuit claims, literally redrawing the map in granting constitutional recognition to aboriginal self-determination. On April 1, 1999, the NWT will be split in two, and a new territory, named Nunavut, will be created.<sup>202</sup> Nunavut will consist of a large section of mainland North America, and will also include almost the entire Canadian Arctic archipelago of islands west of Greenland (*Kalaallit Nunaat*), and all of the islands within Hudson Bay and James Bay — an area one-sixth that of the entire country of Canada. Rather than establishing an autonomous region within (or on top of) existing provincial or territorial boundaries, the Nunavut Territorial Government will have the same rights, responsibilities, and duties as the Government of the Yukon Territory and the Government of the NWT.<sup>203</sup>

the Nunavut Water Board and the Nunavut Wildlife Management Board).

200. NLCA, *supra* note 176, § 12.6.2.

201. Nunavut Act, ch. 28 (1993) (Can.).

202. NIC, *Footprints in New Snow*, *supra* note 175, at ch. 1(a). Inuit negotiations began at the same time that the Cree and Inuit in Québec were negotiating the James Bay and Northern Québec Agreement, but stalled over Inuit concern over local representation on the negotiating committee. Kersey, *supra* note 55, at 436.

203. Given the distinctive nature of the Territory of Nunavut in relation to previous self-government and land claims agreements, the creation of the Province of Manitoba can provide a useful lesson for both the reader and the Inuit in the future. The Manitoba Act created the first new province after confederation in 1867, in response to strong, and sometimes violent, protests by the Métis in the prairie region. In the 1860s the Métis had aggressively resisted the influx of pioneers from the east, seizing a Hudson's Bay Company post. They sought from the federal government the protection of their aboriginal rights, including property rights, and the creation of "a government similar to that of the other Canadian provinces." TLE, *A Debt To Be Paid Ch. I*, *supra* note 63, at 2 of 2.

The Manitoba Act spends most of its 36 sections on the establishment and powers of the new provincial government. The Act makes no direct statement about why the province was created, although § 31 states that it is "expedient, towards the extinguishment of Indian title to the lands in the Province," to appropriate 1,400,000 acres of land to Métis families. Manitoba Act § 31. The power to select these lands lay with the federal government, however, not the Métis themselves. *Id.* §§ 32(1)-(4). The Métis problem was not settled by the passage of the Act. Violence continued against settlers, in response to unsettled land claims; continued inaction in Ottawa lead to still more outbreaks of turmoil. Eight thousand federal troops were sent to the province, the Métis leaders were arrested, and their organization was dismembered. INAC, *The Canadian Indians* (visited Nov. 22, 1996) <<http://www.inac.gc.ca/pubs/indian/reb.html>>; Louis Riel Metis Council, *Louis Riel Metis Council Homepage* (visited Dec. 15, 1996) <<http://www.paranoia.com/~iriel soc>>. Today, the Métis and First Nations peoples make up a small part

As with other acts creating provinces or territories,<sup>204</sup> the Nunavut Act focuses on the structure and powers of the territorial government.<sup>205</sup> The territorial government's powers include both municipal-type functions identified in the Indian Act and provincial-level powers such as control over voting regulations, taxation, marriage, incorporations, and a justice system (including defining property rights, imposing fines and sentences, and managing prisons).<sup>206</sup> All these closely parallel the legislative powers provision in the Northwest Territories Act, which created the NWT.<sup>207</sup> A more unique provision of the Nunavut Act allows the territorial government to "preserv[e], use and promot[e] the Inuktitut language," so long as the government does not interfere with the status or rights of English and French speakers.<sup>208</sup> Regarding the rights of other aborigines, the territorial government may not "restrict or prohibit" hunting rights,<sup>209</sup> while it may enact laws to implement the NLCA, as well as other land claims agreements with other aboriginal peoples if the federal government should so designate.<sup>210</sup>

Advising and guiding the creation of the territory's government is the Nunavut Implementation Commission (NIC), a body established by the Nunavut Act itself.<sup>211</sup> The nine-member NIC is charged with advising the signatories to the Nunavut Act. When Nunavut comes into being in 1999, the NWT's laws will initially carryover into the new territory, and will continue to apply until the Nunavut legislative assembly can revisit the code that it inherits.<sup>212</sup> NIC has produced a document outlining the territorial creation process,<sup>213</sup> and has issued proposals on the makeup of the territory's legislative assembly,<sup>214</sup> including an unusual proposal to require that each electoral district elect one man and one

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of the population and land area of Manitoba. Statistics Canada, *Canadian Dimensions — Selected Ethnic Origins* (visited Mar. 30, 1997) <<http://www.statcan.ca/english/pgdb/people/population/demo28c.htm>> (people classified as Métis or "Indian" total 73,975, out of a total provincial population of 669,405). The influx of white settlers overwhelmed any potential that existed for the Métis to form their "own" province. See also *supra* notes 111-13 and accompanying text.

204. See *supra* notes 105, 203.

205. Nunavut Act, ch. 28 pt. 1, §§ 13-17 (1993) (Can.); cf. *inter alia* Manitoba Act §§ 32(1)-(4).

206. *Id.* pt. 1, § 23(1)(a)-(x); see also *id.* pt. 1, §§ 31-36 (detailing the scope and powers of the territory's judiciary).

207. See also NIC, *Footprints in New Snow*, *supra* note 175, ch.1, at 3 of 8.

208. Nunavut Act, ch. 28, pt. 1, § 23(1)(n) (1993) (Can.).

209. *Id.* pt. 1, § 24.

210. *Id.* pt. 1, § 25.

211. *Id.* pt. 3, §§ 54-58.

212. *Id.* pt. 4; NIC, *Footprints in New Snow*, *supra* note 175, app. 7, at 3 of 10; see also NTI, *supra* note 193, at 2 of 3 (land use planning "rules and procedures are closely modeled on the existing regime in the NWT").

213. The index to this document can be found at NIC, *Footprints in New Snow* (visited Sept. 19, 1996) <<http://www.nunanet.com/~nic/footprintsindex.html>>.

214. NIC, *Footprints in New Snow*, *supra* note 175, ch. 4, at 3-4, 6 of 7.

woman.<sup>215</sup> In this process NIC endeavored to meld modern parliamentary systems to traditional Inuit societal ideas about governance and decision making.<sup>216</sup> This has extended even to recommendations about the design of the territorial government's office and administrative buildings.<sup>217</sup>

The Nunavut Act was not enacted, nor will the Territory of Nunavut be established, to provide explicitly for aboriginal self-determination.<sup>218</sup> NIC itself states that the new government will "not [be] a form of ethnic self-government"<sup>219</sup> and that "the government of this new territory should be a 'public' one, that is, a government which would be answerable to a legislative assembly elected by all citizens meeting residence and age qualifications and whose activities would be subject to Constitutional and statutory guarantees against discrimination."<sup>220</sup>

In practice, however, the creation of Nunavut will allow the Inuit a large degree of self-determination — indeed perhaps the strongest such government in North America since the Iroquois (*Hodensaunee*) Confederacy was created several centuries ago.<sup>221</sup> This stems in part from sheer numbers; the Inuit make up 85% of Nunavut's population.<sup>222</sup> In addition, as noted *supra* the NLCA provides for proportional representation of the Inuit in government employment.<sup>223</sup> The NPC recognizes that "[t]he Inuit . . . will therefore have

215. *Id.*

216. *Id.* app. 8, at 4-5 of 17.

217. *Id.* app. 7, at 9 of 10.

218. Nunavut is not an autonomous region comparable to neighboring Kalaallit Nunaat (Greenland), a department of Denmark. Greenland operates under a Home Rule Government established by Denmark in 1979. Governance of internal matters such as schools, welfare, and taxes is managed by the Home Rule Government, while the Danes control defense and foreign affairs. Greenland Tourism *a/s*, *Greenland - A Modern Arctic Society Part 3 of 4* (visited Oct. 7, 1996) <<http://www.greenland-guide.dk/gt/intro-03.html>>. Despite this European-based control, however, when Denmark joined the European Community (now the European Union), Greenland successfully sought to be exempted from that action. In addition, Danish territory is considered to be foreign for customs purposes. Greenland Tourism *a/s*, *Greenland - A Modern Arctic Society Part 4 of 4* (visited Oct. 7, 1996) <<http://www.greenland-guidedk/gt/intro-03.html>>; see also Franks, *supra* note 62, at 233 ("Denmark's Greenland, Kalaallit Nunaat, . . . represents a far less paternalistic approach to native self-government than the historic approach of the United States . . .").

219. NIC, *Basic Information on the Work of the NIC* (visited Sept. 19, 1996) <<http://www.nunanut.com/~nic/ nunavutfaq.html>>.

220. NIC, *Footprints in New Snow*, *supra* note 175, at 2 of 8.

221. WEATHERFORD, *supra* note 38, at 135 ("When the Europeans arrived in America, the [Iroquois] league constituted the most extensive and important political unit north of the Aztec civilization.").

222. *Nunavut/Western NWT Fact Sheet*, *supra* note 164. This compares to a figure of 37% for the NWT as a whole. Virtually 100% of Nunavut's aboriginal population is Inuit, while for the NWT the Inuit make up just over 60% of the territory's aboriginal population (the remainder being classified as "North American Indian" and "Métis"). *Id.*

223. NLCA, *supra* note 176, art. 23.2.1 (stating that "[t]he objective of this Article is to increase Inuit participation in government employment . . . to a representative level.").



a preponderant influence in a public government to be elected by all residents of Nunavut, Inuit and non-Inuit."<sup>224</sup>

In summation, the Nunavut Act and the NLCA provide the "high water mark" for the aboriginal right of self-determination in Canada. In particular, land claims agreements stand in contrast to their earlier counterparts that faltered, such as the Numbered Treaties and the Manitoba Act.<sup>225</sup> At one extreme, reserves have not been successful because they have kept title to the land in the Crown, and placed even First Nations with reserved land under both federal and provincial control. On the other hand, the Manitoba Act, by creating a province like any other, precluded First Nations' ability to address its own unique concerns. By creating a new jurisdiction of a status equal to its sibling territories, the Nunavut model works well for the concerns of the Inuit within the Canadian system — a federalism marked by a relatively weak central government, powerful provinces, and intermittent threats of schism along regional and ethnic lines.<sup>226</sup> Because Nunavut will be a distinct territory, it will operate under the direct oversight of Parliament and the strictures and obligations of the Charter of Rights and Freedoms. The Inuit in Nunavut, however, will now be free of the intermediate layer of "outsider" government represented by the NWT. Hopefully, because of the constitutionalization of this arrangement, in conjunction with the rights embodied in the NLCA and its Inuit employment quotas (as well as geography and climate),<sup>227</sup> the Inuit of Nunavut will not face the same power dilution problems that handicapped the Métis under the Manitoba Act.

### III. United States Aboriginal Policies

The historical pattern of United States/aboriginal contact largely parallels the Canadian experience. The two chief differences have been the greater reliance on federal legislation in the United States, rather than treaties and provincial- or state-level legislation, and the different timing of the various types of

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"Representative level" is defined as the ratio of Inuit to the total Nunavut population. NIC, *Footprints in New Snow*, *supra* note 175, ch. 1(b).

224. Nunavut Planning Commission, *Nunavut Government* (visited Oct. 2, 1996) <<http://npc.nunavut.ca/eng/nunavut/govern.html>>; cf. Kahanu & Van Dyke, *supra* note 7, at 437 (noting, in reference to U.S. tribes whose government took the form of state-chartered municipalities that "the growth of the non-Indian population in the municipality jeopardizes the control of the government. . . . It is therefore entirely possible that the non-Indian population might exceed the Indian population, thereby placing municipal control in the hands of non-Indians"); see *infra* notes 250-59 and accompanying text.

225. See *supra* note 203.

226. See Catherine Valcke, *Québec Civil Law and Canadian Federalism*, 21 YALE J. INT'L L. 67, 69 (1996); Allen Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53, 59 (1995).

227. See NIC, *Footprints in New Snow*, *supra* note 175, ch. 1, at 6 of 8 (referencing the "obvious reasons of climate and ecology" as to why the Arctic region was not "homesteaded").

federal/tribal interactions. For example, the U.S. treaty-making process started from the same precedents as Canada's and similarly aimed to secure title to lands already under U.S. jurisdiction and thereby allow for settlement.<sup>228</sup> The U.S. process took place much earlier, however, beginning with the Revolutionary War period itself and ending by congressional fiat in 1871<sup>229</sup> — just as the Canadian federal treaty process was hitting its stride. Since that time U.S. federal jurisdiction over aboriginal sovereignty has focused on legislation and Congress, rather than direct negotiation and judicial interpretation of treaty-based rights. Nevertheless the judiciary provides an important role through interpreting the Constitution and Congress's power over tribal governments and tribal members.

### A. The Judiciary

A triad of early U.S. Supreme Court decisions provided a foundation for the federal legislation that has marked U.S. federal/aboriginal relations, as well as later judicial decisions. In the first, *Johnson v. M'Intosh*,<sup>230</sup> Chief Justice Marshall used the "discovery doctrine" to uphold not only British (and therefore American) sovereignty over, but also underlying title to, American lands. What exactly this meant for the original, aboriginal rights was unclear, though Marshall stated that "the rights of the original inhabitants were . . . necessarily impaired" by this doctrine.<sup>231</sup> "[T]he exclusive power to extinguish that [aboriginal title] [is] vested in that government which might constitutionally exercise it."<sup>232</sup>

Nine years later Marshall ameliorated *M'Intosh*'s sweeping conclusions in *Cherokee Nation v. Georgia*.<sup>233</sup> It was here Marshall developed the famous notion of tribes as "domestic dependent nations," characterizing Indians as "wards" of the United States.<sup>234</sup> A year later in *Worcester v. Georgia*,<sup>235</sup> Marshall went even further in reversing the discovery doctrine's impact, stating that it was inconceivable that "the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied . . ."<sup>236</sup> In doing so Marshall confirmed that the tribes were sovereign and that the states had at best limited authority over tribes and tribal members.<sup>237</sup>

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228. Campbell, *supra* note 14, at 103.

229. *Id.* at 104 (citing Act of Mar. 3, 1871, 16 Stat. 388 (codified at 25 U.S.C. § 71 (1994))).

230. 21 U.S. (8 Wheat.) 543 (1823).

231. *Id.* at 574. Note the similarity of reasoning to that employed later by the Canadian court in *St. Catherine's Milling*, *supra* text accompanying note 108.

232. *M'Intosh*, 21 U.S. at 585.

233. 30 U.S. (5 Pet.) 1 (1831).

234. *Id.* at 17.

235. 31 U.S. (6 Pet.) 515 (1832).

236. *Id.* at 543.

237. *Id.* at 553-54.

Noted Indian law scholar Felix Cohen summed up the Supreme Court's early jurisprudence on tribes with three points: (1) tribes possess all the powers of a sovereign state; (2) conquest has terminated tribes' external sovereignty and rendered their internal sovereignty subject to Congress; and (3) absent congressional or treaty qualifications to the contrary, tribes continue to possess all attributes of internal sovereignty.<sup>238</sup> David Getches describes the Court as the "conscience" of federal Indian law, "protecting tribal powers and rights at least against state action, unless and until Congress clearly states a contrary intention."<sup>239</sup>

### B. The States

While the Constitution assigns Congress great authority to regulate commerce "with the Indian tribes,"<sup>240</sup> and hence to regulate Native Americans as individuals, it neither gives to nor recognizes in states any power over Indians within their borders. Because of this, there are implicit restrictions on what state legislation applies to Native Americans and tribal governments; for example, states are quite restricted in their ability to impose taxes (even nonspecific taxes) on Native Americans,<sup>241</sup> and especially on tribal governments.<sup>242</sup> (Note that this is quite different than the powers of Canadian provinces over First Nations and Métis within their jurisdiction.) Nevertheless over the years states have been increasingly able to extend their powers into Indian-related affairs,<sup>243</sup> often by chipping away at the definition of "Indian Country" and tribal lands.<sup>244</sup> As reservations have experienced development on their borders (and increasing numbers of non-Indian residents and businesses inside), they have become "jurisdictional vacuums" that states have attempted — increasingly success-

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238. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (Univ. of N.M. photo. reprint 1970) (1942).

239. Getches, *supra* note 24, at 1573-74. See generally *id.* at 1589-93 (describing Supreme Court jurisprudence).

240. U.S. CONST. art. I, § 8, cl. 3.

241. See, e.g., *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980); *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973).

242. Getches, *supra* note 24, at 1585.

243. See, e.g., *South Dakota v. Bourland*, 508 U.S. 679 (1993) (tribe could not regulate or exclude non-Indians from hunting on non-trust reservation lands); *Duro v. Reina*, 495 U.S. 676 (1990) (tribal court had no criminal jurisdiction over nonmember Indian).

244. See Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281, 1282 (1995). See generally Judith V. Royster & Rory Snowarrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581 (1989); Royster & Snowarrow Fausett, *Fresh Pursuit*, *supra* note 33. Some states go even further in attempts to reduce aboriginal sovereignty. See Valencia-Weber, *supra*, at 1300 ("The policy of the State of Alaska is that Alaska is one country, one people. The State of Alaska opposes expansion of tribal governmental powers and the creation of 'Indian Country' in Alaska.") (quoting Alaska Gov. Walter J. Hickel in 1991).

fully — to fill.<sup>245</sup> Indian rights advocates have criticized this development, noting that administrative efficiency and certainty require tribes to be the sole authority on reservations; "[t]he only alternatives to this arrangement are continued jurisdictional chaos on Indian reservations or tribal suicide."<sup>246</sup> In addition states provide the majority of social services to tribal members,<sup>247</sup> and of course are the sole interactor with tribes that are not federally recognized.<sup>248</sup>

Not all state interaction with aboriginal populations has been to the detriment of the latter, however. For example, the State of Maine has set aside two nonvoting seats in its legislature for the Passamaquoddy and Penobscot Indians, two tribes which control a large land base in the state but which are not recognized by the federal government.<sup>249</sup> Another option for tribes, recognized or nonrecognized, is incorporation as a municipality (city or township) within a state. This is feasible in part because tribal governments exercise powers comparable to municipalities.<sup>250</sup> Tribes organized as state municipalities date back to 1870, when Massachusetts allowed the Mashpee to incorporate and Connecticut did the same for the Gay Head Wampanoag.<sup>251</sup> More recently many tribal villages in Alaska were also state-chartered municipalities, while settlement of the Passamaquoddy and Penobscot land claims in Maine involved incorporations — as well as the dedicated legislature seats.<sup>252</sup>

As state municipalities, the tribes can obtain all the funding, and exercise all the powers, that inhere to any other state municipality.<sup>253</sup> In addition, a nonrecognized tribal government can retain a distinct and separate structure, to allow for adequate representation of non-Indians in the municipal government.<sup>254</sup> The downside is that, as with the Métis experience in Manitoba,<sup>255</sup> there is a risk that the tribal members will be "swamped" by non-Indian immigrants to the municipality; this is especially true if the tribe does not have control over a land base, which would allow it some additional powers to exclude or separate themselves from non-Indians.<sup>256</sup> In addition these municipal governments are also subject to all state laws (barring certain home rule veto provisions applicable to municipalities generally);<sup>257</sup> thus state

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245. Getches, *supra* note 24, at 1589.

246. BORDEWICH, *supra* note 9, at 107.

247. Kahanu & Van Dyke, *supra* note 7, at 454 (citing a figure of 80% to 85% of the "government services received by Indians" as coming from state and local governments).

248. See *supra* note 8 and *infra* notes 250-60 (discussing tribes as state-chartered municipalities).

249. Kahanu & Van Dyke, *supra* note 7, at 454.

250. See *supra* notes 133, 135, and 147-48 and accompanying text; Kahanu & Van Dyke, *supra* note 7, at 435.

251. *Id.*

252. *Id.* at 435-36.

253. *Id.*

254. Cf. *id.* at 436.

255. See *supra* note 203.

256. Kahanu & Van Dyke, *supra* note 7, at 436-37.

257. Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L.

governments can have a more intrusive effect on tribes as municipalities than they do on federally recognized tribal governments.<sup>258</sup> Municipally based tribes are not without any federal opportunity however, because many federal Indian welfare programs utilize "Indian Country" or "Indian community" as their operative nexus.<sup>259</sup> Several circuit courts of appeal have held that communities noncontiguous with reservations, or even communities of nonrecognized tribes, may qualify for such benefits and programs.<sup>260</sup>

### C. Congressional Actions

The converse of the states' limited power over Indian affairs, therefore, is a sweeping power in Congress to affect the federal/Indian relationship and tribal government powers.<sup>261</sup> In the first century of the United States' existence, the most common expression of this power was in the form of treaty making and ratification, largely to secure title to lands and, as a related measure, move individual tribes westward to accommodate "pioneer" expansion and settling of "unoccupied" lands. The idea that the "Indian problem" could be solved by separating the tribes from the advancing pioneers took strong hold in the public's eye and government policy. It was one of the justifications underlying President Jackson's infamous refusal to abide by the Court's decision in *Worcester* and initiate the terrible "Trail of Tears" that followed, with the forced march of the Cherokee west to Indian Territory (now Oklahoma).<sup>262</sup> These Indian removal policies scarcely paused during the Civil War, and returned with a vengeance in the infamous "Indian Wars" of the Great Plains.<sup>263</sup> As the Cavalry shoved tribe after tribe onto reservations, often in places removed from traditional lands, aborigines' ability to maintain a viable livelihood and continue important cultural practices disappeared.<sup>264</sup> This in turn initiated, and then increased, reliance on the U.S. government as a source of both social welfare and governmental authority.

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REV. 1347, 1362-65 (1997).

258. Kahanu & Van Dyke, *supra* note 7, at 436.

259. *See, e.g.* Johnson, *supra* note 14, at 706 (describing the Clean Water Act).

260. *See* United States v. Levesque, 681 F.2d 75 (1st Cir.) *cert. denied*, 459 U.S. 1089 (1982) (town within Passamaquoddy township is an Indian community); United States v. Cook, 92 F.2d 1026 (2d. Cir.) *cert. denied*, 500 U.S. 541 (1991); Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988) (tribal tax only valid on communities identified as within Indian Country); United States v. Martine, 442 F.2d 1022 (10th Cir. 1971) (Navajo "satellite community" is a dependent Indian community subject to federal jurisdiction); *see also* Kahanu & Van Dyke, *supra* note 7, at 431, 433.

261. Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 153 (1980) ("[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.").

262. Campbell, *supra* note 14, at 104.

263. For a particularly insightful account of these conflicts from the aboriginal perspective, *see* Brown, *supra* note 74 *passim*.

264. Getches, *supra* note 24, at 1584.

*1. Historical Congressional Actions*

Eighteenth-century federal treatment towards tribes reached a nadir with the Indian General Allotment Act.<sup>265</sup> That Act took the tribal lands held in trust by the federal government and distributed them to tribal members — homestead-style, 160 acres per person.<sup>266</sup> One of the rationales of the Act was that owning and tilling one's own land would make the Indians become as "civilized" as the white settlers and immigrants that increasingly surrounded them.<sup>267</sup> Because another rationale was the need to open up land for these "pioneers," lands leftover from the allotment process — often a large percentage of reservation land — was then offered to non-Indians.<sup>268</sup> Even worse, tribal leaders did not control what sections of their reservations were allotted to tribal members; federal officials, nominally charged with protecting aboriginal interests, frequently allotted the worst land and reserved prime agricultural land as "surplus" for non-Indians.

The allotment policy was tempered with the enactment of the Indian Reorganization Act<sup>269</sup> (IRA) in 1934. The functions of the IRA are comparable to those of Canada's Indian Act.<sup>270</sup> The IRA facilitated the creation of formal tribal governments, and succeeding programs were often earmarked for IRA tribes.<sup>271</sup> As with the Indian Act, the U.S. Secretary of the Interior has veto powers over proposed tribal governments' powers and structure. Tribal powers incorporated in tribal constitutions are limited to certain spheres, therefore resembling municipal authorities in a way comparable once again to First Nations under the Indian Act.<sup>272</sup>

In another parallel with Canadian legislative actions towards aboriginal population, the United States adopted an explicit policy of "termination" for tribes in the period following World War II.<sup>273</sup> Like a pendulum swinging back, twentieth-century termination mimicked the repudiated allotment doctrine of the previous century — the stated goal of the termination policy being the eventual elimination of Native Americans as a distinct class within the U.S. government system. Tribes were unilaterally dissolved by Congress; members

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265. Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887), *repealed by* 25 U.S.C. § 461 (1994).

266. Getches, *supra* note 24, at 1584.

267. *Id.* at 1622-23. The policy, of course, failed; Indians often either left their lands fallow or (despite statutory restrictions to the contrary) quickly sold their property interest to carpetbagging speculators. *Id.* at 1623.

268. *Id.* at 1584.

269. Indian Reorganization Act, 25 U.S.C. §§ 461-476, 478-479 (1994).

270. See *supra* Part II.C.2 for a discussion of Canada's Indian Act.

271. Kahanu & Van Dyke, *supra* note 7, at 431. Non-IRA tribal governments have been recognized by the courts, but they might not have access to some federal funds. *Id.*

272. See *supra* notes 133-38, 148 and accompanying text; Kahanu & Van Dyke, *supra* note 7, at 431.

273. Campbell, *supra* note 14, at 104.

of terminated tribes became "ordinary" citizens of the states in which their former reservations lay.<sup>274</sup> Before the termination policy ended in the 1960s, 109 tribes, with a total of 11,466 members, had been voided by congressional action.<sup>275</sup>

## 2. Contemporary Congressional Actions

The late 1960s and early 1970s saw a redressing of aboriginal grievances in the United States. A key example of this change is the Alaska Native Claims Settlement Act (ANCSA),<sup>276</sup> a congressional act comparable to the Canadian practice of reaching land claim agreements with aboriginal bands having outstanding land claims.<sup>277</sup> ANCSA transferred \$962.5 million and title to almost 69,000 square miles (just over 12% of the state's area) to 200 aboriginal groups.<sup>278</sup> ANCSA set up twelve tribal corporations, under Alaskan state law, to control the land that the act transferred to the aboriginal population.<sup>279</sup> By assuming the corporate form, aboriginal bands *qua* bands hold title to the land, rather than having individual aborigines hold title to particular parcels. However, this restricts the land's alienability,<sup>280</sup> and raises uncertainties as to what is done with the land if and when a corporation is dissolved.<sup>281</sup> In addition, the precise form the corporation takes is important; a for-profit orientation will negatively impact the aboriginal corporation government's efforts to provide social services.<sup>282</sup> However, Congress or state legislatures creating corporations for non-federally recognized tribes can take these factors into account when designing the corporate legislation.<sup>283</sup>

The Indian Civil Rights Act,<sup>284</sup> another congressional act supportive of aboriginal rights, to some degree parallels section 35 of the Constitution Act, 1982, as it pertains to aboriginal rights generally. The U.S. Supreme Court, however, has restricted the extension of civil rights to individual Indians, arguing that "the application of the conventional constitutional standards of equal

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274. Kahanu & Van Dyke, *supra* note 7, at 453.

275. Campbell, *supra* note 14, at 104.

276. Alaskan Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629a (1994). The Narragansett Indians in Rhode Island and the Passamaquoddy and Penobscot Indians in Maine provide additional examples of tribal governments taking the form of state-chartered corporations. Kahanu & Van Dyke, *supra* note 7, at 434-36, 460.

277. See *infra* Parts II.D-F for a discussion of land claims agreements.

278. Kahanu & Van Dyke, *supra* note 7, at 433.

279. *Id.*

280. *Id.*; Campbell, *supra* note 14, at 106.

281. Kahanu & Van Dyke, *supra* note 7, at 433.

282. *Id.* at 433-34, 436-37 (noting that the corporation's "internal self-government . . . may not be appropriate if the tribe does not have exclusive jurisdiction over [its] land").

283. See, e.g. Kahanu & Van Dyke, *supra* note 7, at 435, 454-55 & 459-62 (noting that several states have allowed non-federally recognized tribes to incorporate as corporations or municipalities).

284. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1314 (1994).

protection and due process would undermine [a] tribe's status as a 'culturally and politically distinct entity' . . . [and] the promotion of Indian self-determination [is] more important than 'providing in wholesale fashion for the extension of constitutional requirements to tribal governments.'<sup>285</sup> Whether this view has consistently been held by the Court is open to some debate.<sup>286</sup> Nevertheless, Congress has not passed legislation expressing disagreement with this reasoning. Indeed a contemporary piece of legislation is the Indian Self-Determination and Education Assistance Act,<sup>287</sup> in which Congress recognized that "Indian people will never surrender their desire to control their relationship both among themselves and with non-Indian governments."<sup>288</sup> This Act lets tribal governments manage federal programs directly, removing the Bureau of Indian Affairs as an intermediary.<sup>289</sup> Though enacted by the Bush administration, the Act reflects a longer-term (if still fairly recent) federal policy in support of aboriginal self-government.<sup>290</sup> As Noelle Kahanu & Jon Van Dyke note, "Indian tribes do not have to conform to the model established in the U.S. Constitution. They need not necessarily have, for instance, a republican form of government, a government with a separation of powers, or a prohibition against the establishment of religion."<sup>291</sup> One area where Congress and the Court have given Indian jurisdiction particularly wide control is adoption, as this is seen as relating to a concept — tribal membership — that is at the core of aboriginal concerns.<sup>292</sup>

Central to all of these congressional acts, however, has been the federal oversight role. "It is one thing for the Congress to permit tribal Indians to make their own laws and be ruled by them. It is quite another for the Congress to permit tribes to exercise general governmental powers without general Federal supervision."<sup>293</sup> Skeptics (some would say realists) point out that Congress'

285. BORDEWICH, *supra* note 9, at 87 (quoting *Martinez v. Santa Clara Pueblo*, 436 U.S. 49 (1978)).

286. Compare Kahanu & Van Dyke, *supra* note 7, at 428 (noting that in the United States "[j]udicial recognition of Indian tribal sovereignty is constantly being tested, and a majority of the present Supreme Court appears to favor limiting the sovereignty of Indian tribes") with Campbell, *supra* note 14, at 114.

287. Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-458hh (1994).

288. BORDEWICH, *supra* note 9, at 84.

289. *Id.* at 57.

290. See, e.g., *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) ("We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government.").

291. Kahanu & Van Dyke, *supra* note 7, at 437-38.

292. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 41-42 (1989) (citing the Indian Child Welfare Act as a source of authority for tribal jurisdiction, but adding that such jurisdiction "is not a novelty of the ICWA" and citing pre-ICWA cases); see also *Iowa Mutual Ins.*, 480 U.S. at 14 ("Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" (citing *United States v. Mazurie*, 419 U.S. 544, 557 (1975))).

293. BORDEWICH, *supra* note 9, at 85 (quoting Rep. Lloyd Meeks in 1977).



strong control over Indian affairs would not have occurred without Supreme Court acquiescence;<sup>294</sup> the Court has stated that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance."<sup>295</sup> With Congress's plenary power over Native Americans, any and all forms of *tribal* self-government could theoretically be abolished "overnight."<sup>296</sup> While true, such extreme actions are unlikely from a realism perspective; congressional abrogation of state-chartered corporate and municipal forms of tribal organization would be even more difficult for Congress to alter — if not unconstitutional.

#### *D. Native Hawaiians and the Hawaiian Islands*

Until just over a century ago the government of Hawaii had been among the select club of non-European nations to resist colonization. The independence of the Hawaiian monarchy was recognized in treaties with European powers<sup>297</sup> as well as the United States.<sup>298</sup> Prior to any contact with Europeans, the governing system of the Hawaiian Islands (*Hawai'i Nei*) consisted of a feudal-like system of chiefdoms and communal lands.<sup>299</sup> The islanders' first European contact was Captain James Cook in 1778.<sup>300</sup> Within a few decades, King Kamehameha I had unified the entire archipelago under his control — partially with the assistance of European military advice in the form of two captured sailors from Cook's ship.<sup>301</sup>

Over the next fifty years European trading and commercial pressure on the royal government was strong,<sup>302</sup> and in 1848 the traditional land tenure system was altered (in the *Ka Mahele* or "Great Mahele") into a scheme more favorable to private property and the alienation of land.<sup>303</sup> Further outside pressure led

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294. See generally Getches, *supra* note 24.

295. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

296. Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 UTAH L. REV. 1105, 1106 (1995) [hereinafter Tallchief Skibine, *Reconciling*] (emphasis added to paraphrase).

297. Trask, *supra* note 43, at 80.

298. Wilkinson, *supra* note 6, at 228 n.11; Boyle, *supra* note 43, at 727.

299. S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 313 (1994). Recall the connection (and distinction) between aboriginal land claims and sovereignty claims. See *supra* notes 51-55 and accompanying text.

300. Wilkinson, *supra* note 6, at 227-28.

301. Joseph D. Gebhardt, *Native Hawaiian Land Rights in the Context of the Native Hawaiian Sovereignty Movement*, 8 ARIZ. J. INT'L & COMP. L. 265, 265 (1991).

302. Trask, *supra* note 43, at 78 (noting that "[i]n the twenty years between 1824 and 1844, over fifty foreign man-of-war ships came to our shores, many threatening to take over our islands."); Wilkinson, *supra* note 6, at 229.

303. Anaya, *supra* note 299, at 314; Trask, *supra* note 43, at 78 (In the *Ka Mahele* the monarch received approximately 1 million acres of land, the 245 lesser chiefs about 1.6 million acres, and about 10,000 commoners about 29,000 acres).

to more changes in government. In 1876 the "Bayonet Constitution" was adopted by King Kalakaua, limiting the monarch's power and restricting suffrage to Hawaiians who owned property. Because of the nature of the land distribution in the *Ka Mahele*, this voting restriction fell heavily on Native Hawaiians, as opposed to European or American immigrants to the islands, most of whom owned some property.<sup>304</sup>

One's view of these preannexation actions by Kamehameha and his heirs varies depending on one's goal. Native Hawaiian advocates argue that the unification was "instrumental" in preserving Hawaiian culture over the next century.<sup>305</sup> A counter argument could be made: with the mere arrival of European influence and Kamehameha's seizure of other chiefs' fiefdoms, the Islands' culture was irrevocably altered from its original, aboriginal norm; in conjunction with further developments *before* annexation this means that history-based self-determination claims should be somewhat suspect.<sup>306</sup>

Kalakaua's successor, Queen Liliuokalani, attempted to restore the monarchy's power in 1891. Her actions were met with a coup d'etat organized by the American ambassador and American businessmen living on the islands, and backed up with U.S. Marines operating without orders (save those of the businessmen).<sup>307</sup> Seeing the potential for great violence, the Queen conditionally abdicated and placed her fate, and that of her people, in American hands "until such time as the government of the United States shall, upon the facts being presented to it, undo the action of [the coup leaders] and reinstate [the Queen] as the constitutional sovereign."<sup>308</sup> Sensing success, the coup leaders petitioned Congress for annexation, but ran up against the strong opposition of President Cleveland, who called Liliuokalani's overthrow "an act of war, committed . . . without the authority of Congress" and "a substantial wrong . . . we should endeavor to repair."<sup>309</sup> Recent congressional legislation supports Cleveland's interpretation of the coup against Liliuokalani.<sup>310</sup>

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304. Trask, *supra* note 43, at 78. The effects of the *Ka Mahele* and the Hawaiian constitutions are still felt today in some settings. See Rob Perez, *Title Claims Block Isle Land Deals*, HONOLULU STAR-BULLETIN, Jan. 8, 1997, at 3.

305. Anaya, *supra* note 299, at 314. In the century following Cook's contact, the Native Hawaiian population dropped 87% due to European diseases. *Id.* at 316.

306. See *supra* note 36 (quoting BORDEWICH, *supra* note 9, on the validity of aboriginal governments' claims to legitimacy); Gebhardt, *supra* note 301, at 266 ("The Great Mahele was . . . part of the beginning of old Hawai'i's undoing."); *Hawaii's Sovereignty #1: The Apology Law* (Voice of America radio broadcast, Nov. 12, 1996) (describing the ethnic composition change as "gradual[]") [hereinafter VOA #1]; cf. DE JOUVENEL, *supra* note 29 (noting the subjective nature of the labels "conqueror" and "conquered").

307. Chock, *supra* note 42, at 465; Trask, *supra* note 43, at 79. This section also draws upon the congressional findings of fact in Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.A.N. (107 Stat.) 1510.

308. Chock, *supra* note 42, at 465.

309. Wilkinson, *supra* note 6, at 229-30.

310. See *infra* note 329.

In the face of the Cleveland administration's intransigence, the Americans responsible for the coup declared an independent "Republic of Hawaii," though their goal continued to be annexation by the United States. Five years later, under the new McKinley administration and the expansionist mood that followed the Spanish-American War, Congress approved a new annexation request and Hawaii became a territory of the United States. Throughout this period, and especially in recent years, Native Hawaiians have worked to reclaim their sovereign powers and exercise greater self-determination.

The resolution annexing the islands placed all "Republic of Hawaii" lands (formerly lands of the monarch and chiefs) with the federal government, to be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."<sup>311</sup> According to the Supreme Court, this phrasing created a trust for *all* of the islands' inhabitants, not just Native Hawaiians.<sup>312</sup> A generation later, Congress set aside 193,000 acres of this public land specifically to "rehabilitate" Native Hawaiians, who lived in poverty akin to that of their mainland counterparts, through homesteading and agriculture.<sup>313</sup>

The Territory of Hawaii became a state in 1959, and with statehood both land trusts were transferred to the state government.<sup>314</sup> (Native Hawaiian activists note that before the statehood vote, the Territory of Hawaii was listed as a "non-self-governing" territory under article 73 of the U.N. Charter; as such the jurisdiction should have been offered an "independence" option in the statehood vote, but this was not done.<sup>315</sup> The United Nations, however, did formally recognize the validity of the Hawaiian statehood vote as meeting the self-determination requirements of article 73.)<sup>316</sup> The state's Admission Act recognized a distinction in the trusts' beneficiaries between the islands' general inhabitants and the Native Hawaiians, but did not specify how to divide the trust. As a result the state and federal administrators have generally used the trust lands to benefit the general public, rather than Native Hawaiians specifically.<sup>317</sup> In addition, the federal government can, and has, reserved parts of the trust lands for other purposes.<sup>318</sup>

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311. Bradley Hideo Keikiokalani Cooper, *A Trust Divided Cannot Stand — An Analysis of Native Hawaiian Land Rights*, 67 TEMP. L. REV. 699 (1994).

312. Keikiokalani Cooper, *supra* note 311, at 699-700.

313. Anaya, *supra* note 299, at 315-16; Keikiokalani Cooper, *supra* note 311, at 700 (citing the Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (1921) (repealed); Trask, *supra* note 43, at 80).

314. Anaya, *supra* note 299, at 316-17; Keikiokalani Cooper, *supra* note 311, at 700-01; Wilkinson, *supra* note 6, at 231 n.23.

315. Tallchief Skibine, *Reconciling*, *supra* note 296, at 1107; VOA #1, *supra* note 310.

316. G.A. Res. 1469, U.N. GAOR 4th Comm., 14th Sess., U.N. Doc. A/4343 (1959).

317. Trask, *supra* note 43, at 81.

318. Keikiokalani Cooper, *supra* note 311, at 701-02.

By 1983 only 38,000 acres were being used for these purposes, with the remainder used either for public purposes or held by non-Native Hawaiians.<sup>319</sup> Approximately 18,000 people remained on waiting lists for homesteads,<sup>320</sup> while non-Native Hawaiians continued to own the vast majority of private property in the state.<sup>321</sup> This historical and contemporary portrait bears striking similarities to that of the Métis in Manitoba.<sup>322</sup>

#### *E. The Sovereignty Movement*

Native Hawaiians currently make up a minority of the state's population, at just over 12%. The largest ethnic group in the state are Asian-Americans, who make up almost 48% of the state's population.<sup>323</sup> This compares to the Inuit being the substantial majority of the population in the future Territory of Nunavut.<sup>324</sup> In percentage terms, however, the Native Hawaiian population represents the largest aboriginal population of any U.S. state.<sup>325</sup> Culturally, almost 28% of Hawaiian households speak an Asian or Pacific Island language; almost a quarter of such households consider themselves "linguistically isolated."<sup>326</sup>

Currently Native Hawaiians do not even have the same basic sovereignty recognition that is afforded to mainland tribes.<sup>327</sup> Although Native Hawaiians can make a very strong argument for sovereignty, based on the history of their occupation and independent governance of the islands until 1893,<sup>328</sup> Native Hawaiians are denied many of the aspects of sovereignty, up to and especially including control over their land base, that mainland tribes in Canada and the United States claim as an inherent right. They have no distinct recognition as a people, and therefore face more state (as opposed to federal) control. This compares unfavorably with the status accorded even Alaskan aboriginal groups who, like the Native Hawaiians, came under U.S. jurisdiction through a different means than the mainland tribes. Alaskan aborigines "have the same status as other federally recognized American Indians" because of the 1867 cession treaty by which the United States gained control of Alaska from Russia.<sup>329</sup>

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319. Trask, *supra* note 43, at 80.

320. Gebhardt, *supra* note 301, at 267.

321. Wilkinson, *supra* note 6, at 230 (quoting the Hawaii Supreme Court as observing that "[t]he state and federal governments and the largest 72 private landowners own approximately 95 percent of all land area").

322. See *supra* notes 111-13, 203 and accompanying text.

323. U.S. Census Bureau, *1990 Census Lookup (1.4)* (visited Mar. 26, 1997), <<http://venus.census.gov/cdrom/lookup/859383903>>.

324. See *supra* note 222 and accompanying text.

325. Wilkinson, *supra* note 6, at 230 n.19.

326. U.S. Census Bureau, *supra* note 323 (the language figures are not further broken down between Asian and Pacific Islander households).

327. Wilkinson, *supra* note 6, at 231.

328. See *supra* Parts I.C and III.D for a discussion of independent island governance.

329. Alaska Chapter, Assoc. Gen. Contractors of Am., Inc. v. Pierce, 694 F.2d 1162, 1168

Improvements in the Hawaiians' situation have come slowly, and have centered thus far on state action. In 1978 the State of Hawaii amended its constitution to create the Office of Hawaiian Affairs (OHA), an agency managed by Native Hawaiians who are elected in special elections by the Native Hawaiian population.<sup>330</sup> OHA oversees the allocation of and income from the Native Hawaiian trust lands.<sup>331</sup> Native Hawaiians felt that this was an important step towards regaining control over their lands and lives — though by no means was it the end of their efforts.

An achievement with far greater psychological significance came in 1993, when Congress passed a resolution, signed by President Clinton, that acknowledged the illegal role the U.S. government played in the overthrow of the Hawaiian monarchy and the state's annexation.<sup>332</sup> The adoption of this law followed over two decades of lobbying by Native Hawaiians.<sup>333</sup> Success in the halls of Congress spurred the movement, and after lobbying the state agreed to form the Hawaiian Sovereignty Elections Commission (HSEC) to oversee a referendum on the sovereignty question. HSEC was made up of twenty members, nominated by "various Hawaiian organizations" and appointed by the governor.<sup>334</sup>

The referendum question was open-ended regarding what would be meant by an 'ae or "yes" vote for sovereignty. Before the referendum, however, OHA prepared three "options" that a sovereignty convention would consider. First, a "state within a state" option, whereby a Native Hawaiian government would be akin to a local (municipal) government. Second, a "nation within a nation" option, whereby Native Hawaiians would achieve status comparable to mainland tribes and not be subordinate to the State of Hawaii in all matters. Finally, an option of potential independence from the United States.<sup>335</sup> Part IV discusses these goals in more detail.

The results of the referendum were overwhelmingly in favor of Native Hawaiian sovereignty.<sup>336</sup> Yet the Native Hawaiian sovereignty movement has not coalesced around any one of the three possible goals.<sup>337</sup> Some argue that

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(9th Cir. 1981).

330. Anaya, *supra* note 299, at 317.

331. *Id.*

332. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510.

333. VOA #1, *supra* note 310.

334. Hawaiian Sovereignty Elections Commission, HSEC (visited Mar. 8, 1997) <<http://planet-hawaii.com/hsec>>.

335. *Hawaii Sovereignty #3: What Model?* (Voice of America radio broadcast, Nov. 14, 1996) [hereinafter VOA #3].

336. *See supra* note 1.

337. *See* Pa Martin, *supra* note 8, at 281 ("The Hawaiian native community is comprised of individuals with diverse philosophies . . . rang[ing] from those who believe it is unrealistic and impractical to advocate for independence from the United States to those who refuse to acknowledge that the United States or the State of Hawaii has any authority over them.").

status comparable to mainland tribes is an appropriate target, or alternatively status as a corporation such as that granted Alaskan natives, or in a municipal form as in the eastern U.S. states.<sup>338</sup> Others disagree, vowing that "the only true sovereignty is independence."<sup>339</sup> Semantically they are correct. As Getches notes, true sovereignty entails control over all within one's boundaries,<sup>340</sup> while tribal jurisdiction over non-tribal members, including other Indians, is quite limited. Even the question of whether this vote supported a constitutional convention was debated by Native Hawaiian activists. HSEC members saw the vote as an endorsement of the next step in the process — a constitutional convention — but some pro-sovereignty anti-referendum activists saw the low rate of response as supporting calls to boycott the vote.<sup>341</sup> (Those calls were issued over controversy surrounding the role of the state government in supporting the referendum. Some saw this as an effort by the state to appear accommodating and to deflate Native Hawaiian energy.<sup>342</sup> That the state government has thus far refused to fund calls for a convention would seem to support this latter view.)<sup>343</sup>

#### IV. The Nunavut Model and Hawaiian Reality

*It is now time for constructive destruction of the status quo.*

— An Inuit Leader<sup>344</sup>

The preceding discussion shows the many parallels between Canadian and American aboriginal policies, both historic and contemporary, and aboriginal populations, again both historic and contemporary. While the interplay of these

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338. See Kahanu & Van Dyke, *supra* note 7, at 428 ("Many Hawaiians . . . want to develop a status that provides more autonomy than that provided to Indians and other Native Americans."); Ka Lahui Hawai'i, *Ka Lahui Hawai'i* (visited Mar. 8, 1997) <<http://kalahui.org>> (grassroots Native Hawaiian group seeking a "Nation to Nation" relationship with the U.S. federal government, similar to that of mainland tribes, and opposed to complete independence).

339. Pu'u'honua "Bumpy" Kanahele, *Voices of Sovereignty*, HONOLULU ADVERTISER, Oct. 11, 1994, at 61 (Kanahele is the head of the aboriginal advocacy group "Nation of Hawai'i, see *infra*); see also Hayden Burgess, *Hawaii Independence: Voters Weren't Offered This Option*, HONOLULU ADVERTISER, Dec. 27, 1992, at B3 (arguing that the 1959 statehood vote was marred by the lack of a choice for independence, and urging independence as a Native Hawaiian goal); Nation of Hawai'i, *Hawai'i Independent & Sovereign* (visited Mar. 8, 1997) <<http://www.hawaiinasion.org/index.html>> (web site "offered to provide information regarding the restoration of Hawaiian independence); cf. Boyle, *supra* note 43, at 723 (comparing the Native Hawaiian situation to that of the unilateral Palestinian declaration of independence in 1988).

340. See *supra* note 24.

341. *Hawaii Sovereignty #4: What Next?* (Voice of America radio broadcast, Nov. 15, 1996) [hereinafter VOA #4].

342. *Id.*

343. *Id.*

344. Morse, *supra* note 8, at 683 (identifying the speaker only as "an Inuit leader").

factors has led to varied forms of aboriginal government in both countries, even peoples as separated as the Inuit and Native Hawaiians have sufficient commonality to allow for reasonable comparison and contrast. Yet, at a structural level one could rebut this presentation by highlighting the strong distinctions between the Inuit and Native Hawaiians, and between Canada and the United States. Therefore assessing the applicability of the Nunavut model to Native Hawaiians today depends not only on the commonalities and parallels already discussed, but also on the precise nature of Native Hawaiian goals — obtaining tribal status under the United States, declaring complete independence from the United States, or creating a semiautonomous jurisdiction within the larger federal framework of the United States.<sup>345</sup>

#### *A. Equal Status with Mainland Tribes*

The first potential Native Hawaiian goal, status as a tribe or a tribal corporation, or alternately as a state municipality, seems quite feasible. Tribal status would center on creating a government with which Congress could interact and under which Congress could restore Native Hawaiian control over their traditional land base.<sup>346</sup> This government would thereafter be the contact point for future interaction, as opposed to going through the State of Hawaii, as well as the source of internal regulations. The U.S. government could provide some sort of funding (whether lump-sum, transitional, or permanent) to the Native Hawaiian government. Depending on the exact structure, tribe versus corporation, the lands currently held by the OHA and other lands could be transferred to the United States to hold in trust for the new Native Hawaiian government (as are mainland tribes' lands), or to the new Native Hawaiian corporation. Because tribal lands are held in trust, only the corporate form of land title holding would be comparable to the land control status reached in the NLCA in Canada.

Alternatively, if Congress does not wish to act in this manner, or is unable to act, the State of Hawaii (which in recent years has shown itself to be somewhat flexible regarding Native Hawaiian claims) could create one or more state-chartered municipalities as agents for holding the lands currently managed by the OHA. This too might require congressional action to be fully workable, however, since it is Congress which passed control of the former royal Hawaiian lands to the state with the Statehood Act. Instead of, or in addition to, creating towns, the state could follow Maine's model and grant dedicated seats in its legislature to the Native Hawaiian people. This would ensure that their voice is heard in the government that manages their lands and most intimately controls their affairs, even though they remain federally unrecognized.

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345. See *supra* note 4 and accompanying text.

346. See *supra* Part III.B for a discussion of contemporary actions Congress has taken with regard to recognizing the land claims of tribes in the eastern United States and Alaska.

Sadly, the applicability of the Nunavut Act towards these tribal-oriented goals is nil. The NLCA may be of more marginal utility, in that it discusses the ownership and control of land uses by a North American aboriginal people, although the Inuit settlement does so in a very different context. The Inuit settlement has a strikingly different geography and climate, a much more recent (and less abrogated) land claim, an environment where nonaborigines are in the minority, and very large swaths of undeveloped property remaining available for title transference. Far more important than the NLCA to any Native Hawaiian tribal-status endeavor, however, would be the hundreds of precedents already established within the United States for interacting with its tribes, and especially the ANCSA and Indian Self-Determination Act. One Native Hawaiian group, Ka Lahui Hawai'i, recognizes this, noting that it "seeks inclusion of the Hawaiian people in the *existing* U.S. federal policy which affords all Native Americans the right to be self-governing . . . ."<sup>347</sup>

Ironically the Nunavut Act and NLCA may be of more utility regarding the creation of native municipal governments or granting Native Hawaiians seats in the legislature. This is so because the structure of the Canadian federal/Inuit relationship is comparable to that of the *state* government to Native Hawaiians — the state controls the land base, and has wide-ranging authority to act within its borders regarding nonrecognized aborigines, in much the same way that the Canadian parliament has wide-ranging authority to legislate for the Northwest Territories, up to and including severing them in 1999. Such strong actions could not be taken by the Canadian federal governments towards Canadian provinces, and similarly the State of Hawaii would be much more constrained to interact with its aboriginal population in a creative manner if the Native Hawaiians were recognized as a tribe by the U.S. federal government.

### *B. Independence*

The Nunavut Act is also somewhat more applicable to the goal at the other end of the spectrum — complete independence. The creation of the Territory of Nunavut shows (and hopefully, its successful operation will demonstrate) that aboriginally based governments can be formed by combining aboriginal and Western notions of governance. However, here too there are a plenitude of examples closer to the Native Hawaiian setting than actions in the Canadian Arctic — for example, the many new, ex-colonial states of the Pacific, Asia, and Africa, including several created from former United States territories or trust territories.<sup>348</sup>

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347. Ka Lahui Hawai'i, *Frequently Asked Questions* (visited Mar. 8, 1997) <<http://kalahui.org/faq.html>>; see also Kahanu & Van Dyke, *supra* note 7, at 428 ("The Native Hawaiian claim to sovereignty is based largely upon established precedents related to Native Americans in North America.").

348. E.g., The Philippines, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, etc. See Tallchief Skibine, *Reconciling*, *supra* note 296, at 1107-08.



The broader, underlying problem for Native Hawaiians, and aboriginal or ethnic minorities generally, is that international law draws a categorical distinction between the right to independence and self-determination as claimed by former colonies, on the one hand, and the absence of such a right for ethnic minorities within the borders of existing sovereign states. Modern self-determination doctrine simply does not transfer to the aboriginal situation. The problem is one of timing and perspective. One could imagine a spectrum of situations of ethnic peoples, ranging from one or more ethnic groups living within a single colonial territory (such as the various island cultures in former Pacific trust territories of the United States), through groups living within an unorganized territory of a sovereign state (the current situation of the Inuit in Canada), or an organized ethnic minority within a fully integrated subdivision of a sovereign state (the status of most mainland tribes in the United States), to an unorganized, unrecognized ethnic group living within that subdivision (the situation of the Native Hawaiians in the State of Hawaii). By many measures the Native Hawaiian claim to sovereignty and independence is as strong as those of colonial peoples in former U.S. "non-self-governing" territories, such as the Northern Mariana Islands or the Republic of the Marshall Islands.<sup>349</sup> It seems odd from a normative perspective that one group, Native Hawaiians, should be prevented from exercising complete and independent sovereignty and self-determination simply because they are making their claim today, rather than in the period before Hawaii became a state of the United States.<sup>350</sup> Yet from a realist perspective few would argue that the disjunction in this spectrum created by the categorical distinction is not indeed the case. Therefore, achieving independence would first require overcoming this international law hurdle.

Further examination of this point is useful. Following the end of World War II, Canada, the United States, and other states called on the European imperial powers to give up their colonies. Where nineteenth- and early twentieth-century political thought had seen the system of colonies and trust territories as a means of shepherding "uncivilized" peoples to statehood,<sup>351</sup> an "extremely rapid" change led to a "virtually complete" decolonization process by the 1960s.<sup>352</sup> While ex-colonial sovereignty was based on a notion of a universal doctrine of

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349. See Tallchief Skibine, *Reconciling*, *supra* note 296, at 1107-08; see also Anaya, *supra* note 299, at 315 (implicitly arguing that Hawaii still merits treatment as a colony, because before statehood "Hawaii [was] a territory of the United States among the ranks of colonial territories of other Western powers driven by the forces of empire").

350. See Anaya, *supra* note 299, at 371 (arguing that the "substantive elements" of the self-determination principle "have been violated" and, when combined with "human rights norms . . . that are related to the principle of self-determination" a valid Native Hawaiian claim exists.).

351. See JACKSON, *supra* note 19, at 86. Jackson describes the British Empire's belief as being that some colonies were "too small" for independence or had "little or no understanding of the workings of a modern state"; moreover for Britain "decolonization meant achieving self-government within the Empire." *Id.* at 86-87 (emphasis added).

352. *Id.* at 74.

self-determination for colonial peoples, this association "did not presuppose underlying nationhood but only subject colonial status."<sup>353</sup>

The self was no longer either historical or ethnic 'nations' but artificial ex-colonial 'jurisdictions' which were multi-ethnic entities in most cases . . . . The self was not determined by plebiscites and virtually no concern was shown for minorities. Determination came down to the eviction of alien European rulers and the assertion of majority rule . . . .<sup>354</sup>

That is, self-determination was *categorical*: if colony, then independent; if ethnic grouping within a larger sovereign jurisdiction, then not independent.

Making colonial self-determination categorical accomplished two ends. First, by denying exceptions or modifications to take into account individual colonies' preparedness for independence, the decolonizing process established that each colony would become independent within the territorial boundaries established by the Europeans.<sup>355</sup> Second, and more importantly, the categorical line allowed governments to distinguish between colonials in colonies and aborigines (and ethnic minorities) in the dominant state's territory.<sup>356</sup> "Self-determination" as a doctrine of international law was not meant to demand actual independence for each possible ethnic group or aboriginal population,<sup>357</sup> and the categorical distinction "serve[d] as a bulwark against demands for self-determination by domestic ethnonational groups."<sup>358</sup> U.S. Sen. Slade Gorton (R.-Wash.) implicitly acknowledged the importance of this distinction during the debate over Public Law 103-150.<sup>359</sup> Recognizing the illegality of Hawaii's annexation, he argued, established a dangerous legal precedent because "every square inch

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353. *Id.* at 75.

354. *Id.* at 78. The implication of this *categorical* definition of self-determination, of course, was that some colonies would be "abandon[ed] . . . against their will." *Id.* at 86. A similar predicament faces North American aboriginal advocates, who recognize that not all tribes or First Nations want, or are capable of, complete independence. See also Markus B. Heyder, *The International Law Commission's Draft Articles on State Responsibility: Draft Article 19 and Native American Self-Determination*, 32 COLUM. J. TRANSNAT'L L. 155, 164-65 (1994).

355. JACKSON, *supra* note 19, at 41; Ratner, *supra* note 57, at 590 (adding that this territory-based decolonizing principle, or *uti possidetis*, applied not only to post-World War II decolonization, but also the earlier decolonization in the Western Hemisphere and the post-Cold War breakup of the Soviet Union and Central European states).

356. Valencia-Weber, *supra* note 244, at 1300. But see VOA #3, *supra* note 335 (stating that under the "blue water" doctrine Hawaii was considered a U.S. colony by the U.N. until 1959, when the territory became a state (but cf. Part III.D (noting U.N. approval of the Hawaiian statehood vote))).

357. JACKSON, *supra* note 19, at 41.

358. *Id.* at 41 (emphasis added).

359. See *supra* note 332 and accompanying text for a discussion of these debates.

of the [United States] was acquired in a manner which bears certain similarities to the acquisition by the United States of what is now the State of Hawaii."<sup>360</sup>

Not only academicians and politicians but also the U.N. General Assembly embrace this categorical distinction between colonies and noncolonial groups: "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."<sup>361</sup> Later U.N. documents have confirmed that the Charter's reference to "peoples" and the right of self-determination does not include indigenous peoples.<sup>362</sup> Unlike the praise heaped on "liberationists" fighting colonial regimes, the international community derisively refers to aborigines who continue to press for self-determination outside of the decolonizing setting as "separatists," "secessionists," or "irredentists."<sup>363</sup> Those groups

are consequently frustrated by the rules of the new sovereignty game which not only exclude them but give no sign of allowing them to play in the future. The accidents of imperial history consign them to the role of unwilling spectators even where they may actually be in effective control of territory.<sup>364</sup>

Unfortunately for those who advocate Native Hawaiian independence from the United States, the application of the categorical distinction to aboriginal groups, or rather its nonapplication, is unlikely to change soon. Both the newer, developing world states in the Pacific, Asia, and Africa, and the older, ex-colonial states of the New World "are understandably united and determined to bar ethnonationalities from the club [of independent states] because if they were admitted it would involve loss of jurisdiction over the territories in question and remaking of international frontiers."<sup>365</sup> If the right of having an independent state were granted to every aboriginal or ethnic group, "most existing ex-colonial states would be broken up just as the Austro-Hungarian empire was broken up by granting self-determination to the nationalities of Central

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360. VOA #1, *supra* note 310.

361. U.N.G.A. Res. 1514.

362. Russell Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 37-38 (1994) (arguing instead that the term "peoples" should be liberally construed).

363. JACKSON, *supra* note 19, at 41-42 (citing the Palestinians as "among the very few dispossessed nationalities that have achieved an anomalous quasi-sovereignty").

364. *Id.* at 41-42. Any recognition of aboriginal or ethnic states created by force will only be recognized "if [other states] have received prior recognition from the sovereign governments involved." *Id.* at 153. But see Ratner, *supra* note 57, at 590 (arguing that "international law declares the lack of either a blanket right to, or prohibition against, secession . . . relegat[ing] its achievement to a pure power calculus" and that the U.N. states "accept accomplished breakups after the fact").

365. *Id.* at 42, 190 (citing "an international determination to retain the existing political map . . . however worthy or just the cause").

Europe."<sup>366</sup> If this analysis is correct, independence for Native Hawaiians is not an option under the self-determination doctrine.

Even some Native Hawaiian sovereignty advocates recognize that realistically the odds of achieving independence would be quite small — and that the Native Hawaiian movement is hindered by those who push for so extreme a solution, and should instead concentrate its energies on more achievable goals.<sup>367</sup>

(An interesting question that follows quite easily from the logic of the categorical distinction is whether Canada's decision to create the distinct Territory of Nunavut in 1999 will in the end compromise the Canadian federal government's efforts to maintain Canadian unity. By establishing defined borders and an aboriginal-majority territorial government, Canada may be creating the necessary conditions precedent for a valid Inuit claim to full independence down the road.)<sup>368</sup>

### Conclusion

Part IV.A noted the relative legal (if not political) ease which would accompany the establishment of Native Hawaiians as a tribe or a municipal corporation. Yet this is not the solution that many Native Hawaiians seek. On the other hand, Part IV.B showed that the alternative desired by some Native Hawaiian advocates — independence — is legally untenable and unlikely to occur, even through the (extremely unlikely) use of force.<sup>369</sup> With the two extremes removed from the set of potential solutions, any remaining proposals to address the Native Hawaiian claim will have to occur within the existing (or perhaps a modified) U.S. federal system. Here the Nunavut model of a new, distinct but equal jurisdiction may be of more utility to Native Hawaiians.

Some have argued that "Indian aspirations to political autonomy [threaten] to create a new third sphere of sovereignty that was never contemplated by the U.S. Constitution" and that "[w]hile [the sovereignty movement] is giving much-needed flexibility to tribes, it is also creating a hodgepodge of economically, and perhaps politically, unviable states whose role in the United States is glaringly undefined in the U.S. Constitution."<sup>370</sup> Yet this sentiment not only ignores the very nature of any federal system, but it also ignores the U.S. Constitution itself, which sets the stage for determining the status of Indians within the U.S.

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366. *Id.* at 78 (terming the chances of existing states being divided to accommodate aboriginal sovereignty "bleak").

367. VOA #3, *supra* note 335.

368. Cf. Ratner, *supra* note 57, at 591. Ratner notes that "a policy or rule that transforms all administrative borders of modern states into international boundaries creates a significant hazard in the name of simplicity — namely, the temptation of ethnic separatists to divide the world further along administrative lines." He uses Québec as an example of an area the succession of which may be more easily proposed because of the existing administrative (provincial) boundaries. *Id.*

369. See *supra* note 364.

370. BORDEWICH, *supra* note 9, at 12, 314.

system. First, the Constitution, as well as the Articles of Confederation which preceded it, seem to divide the world into three spheres: states, tribes, and foreign states.<sup>371</sup> The placement of tribes in the middle zone gives one much more flexibility today to experiment on achieving the most efficient yet equitable solution to the Native Hawaiian claims. Second, the Constitution by definition incorporates several sovereign governments — the states — into a larger federated whole, without abrogating their rights as sovereigns *per se*.

The role of ethnic minorities within a larger jurisdiction is not a unique question in the "postmodern" era, nor is it limited to aboriginal concerns. Ghita Ionescu addresses similar concerns over the integration of the European Union. "[A]t what level can political cohesion, order and stability best be achieved in the industrial age: at the national or at the supra-national level?"<sup>372</sup> And moreover, why and to what ends would any aboriginal group agree to table its independence demands and focus on integrating within an existing federal system?

As Chief Justice John Marshall noted, "the settled doctrine of the law of nations is that a weaker power does not surrender its independence — its right to self-government, by associating with another and taking its protection. A weak State, in order to provide for its safety, may place itself under the protection of [a] more powerful [state] without stripping itself of the right of government, and ceasing to be a State."<sup>373</sup> Indeed this is the very place of individual states, or associated jurisdictions such as Puerto Rico, within the U.S. federal system.<sup>374</sup> Thus we see that the granting of sovereignty to, or

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371. See U.S. CONST. art. I, § 8, cl. 3 (giving Congress authority to regulate interstate commerce and commerce with Indian tribes, see *supra* note 232 and accompanying text); cf. ARTICLES OF CONFEDERATION art. IX (U.S. 1777) ("The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any States."); see also Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 381 (1989) (stating that the Constitution provides protection for aboriginal rights by placing them under the federal, not state, purview, and (in a related sense) by blunting the ability of the majority to impose their will on the minority).

372. Ghita Ionescu, *Between Sovereignty and Integration: Introduction in BETWEEN SOVEREIGNTY AND INTEGRATION* 9 (Ghita Ionescu ed., 1975).

373. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832) (addressing directly the question of aboriginal populations within the United States' jurisdiction).

374. See Tallchief Skibine, *Reconciling*, *supra* note 296, at 1107-08. He notes:

The United States considers Guam, the U.S. Virgin Islands, and American Samoa as still 'non-self-governing' for purposes of [U.N. Charter] Article 73 . . . By contrast, the states of Alaska and Hawaii, as well as the Commonwealth of Puerto Rico, all of which used to be 'non-self-governing' for purposes of Article 73, have completed acts of self-determination through which they have resolved the terms of their respective relationships with the rest of the United States. Similarly, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, and the Republic of the Marshall Islands, all of whom were once part of the Trust Territory of the Pacific Islands, have completed the process of self-determination [and, Tallchief Skibine should clarify, doing so by choosing

recognizing the existing sovereignty of, aboriginal peoples can be thought of not only as a *restoration* to some prior situation (i.e., when North American aboriginal bands operated without European interference), but also (or, perhaps, simply "instead") as an *innovation* within international law and domestic political structures.<sup>375</sup>

Thus, various possible arrangements of power between the associated sovereigns individually, and the federal government of them all, lie between the two extremes of the self-determination spectrum. An indigenous group, for example, may have the power to enact economic programs but not to organize itself politically. Indigenous people may receive the right to manage the mineral and water resources on their land, but not to alienate their land or to organize their local political bodies.<sup>376</sup> Or that group may simply realize that it would rather have a central government perform certain functions and, in exchange, absorb certain costs.<sup>377</sup> De Jouvenel illustrates this point nicely:

The power inherent in Primus [de Jouvenel's term for an independent person], which determined his radius of action, gave him naturally a circular domain within the limits of his radius; but the effect of social regulations is to forbid him certain regions of this circular domain — zones which are now darkened and barred to him. This causes him to lose what Beccaria called 'portions of liberty', but his loss is profitable to him, for the Sovereign, who forbids Primus to enter certain zones of his primitive domain, guarantees him at the same time against anyone invading the rest of his circle — all the zones that have not been shaded in. Primus, who would lead a disturbed life as master of a complete circle, is able to lead a quiet one as master of a truncated circle.<sup>378</sup>

By providing one answer to such possibilities, the Nunavut Act and the NLCA provide an example of how willing a modern Western government can be to accommodate internal polities and their civil rights claims.<sup>379</sup> From one

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independence over integration].

*Id.*

375. JACKSON, *supra* note 19, at 78-81.

376. Torres, *supra* note 10, at 142.

377. See generally Jonathan Rodden & Susan Rose-Ackerman, *Does Federalism Preserve Markets?*, 83 VA. L. REV. 1521 (1997) (discussing the market efficiencies that are gained in hierarchical federal systems through the centralization of externalities and the ability of lower jurisdictions to experiment with alternative economic strategies).

378. DE JOUVENEL, *supra* note 29, at 250. De Jouvenel goes on to state, perhaps unsympathetically, that "the man who is fully aware of the advantages for himself in this barter of independence for security should in reason cease to desire what is forbidden him" though he admits that "there is not a man who, at the time of encountering these restrictions, does not feel differently about them than he did when his reason caused him to promulgate them." *Id.* at 251.

379. See also Michael Goldfarb, *All Things Considered: Scotland Parliament* (National Public Radio broadcast, Apr. 14, 1997) (noting the British Labour Party's willingness to create

perspective, such accommodation logically follows from a liberal Western government's response to internal complaints about representation and self-determination.<sup>380</sup>

Congress has plenary authority over aboriginal matters<sup>381</sup> and also has the ability, with a given state's consent, to create new states.<sup>382</sup> The Executive and Congress together have quite broad powers to create Cabinet-level positions and to establish federal enclaves with special rights and duties. In addition the flexibility of the State of Hawaii,<sup>383</sup> though dismissed by some as a strategic effort to blunt Native Hawaiian strength, also shows a willingness to be creative and open to the idea of "experimenting" with new forms of jurisdiction. Given these capabilities, it does not seem too difficult to imagine a scenario in which Congress and the State of Hawaii agree to some intermediate governmental structure for the Native Hawaiian community — stronger than a tribe and its reservation, but not so distinct or strong to be considered a state represented in Congress. There has already been a great deal of research and academic thought turned towards the notion of creating some alternative structural relationship between the federal government and U.S. aborigines — ranging from promoting pure independence to establishing Puerto Rico-like commonwealths, to creating distinct Indian states.<sup>384</sup> Additional options include granting a Native Hawaiian government or corporation "veto" powers over state legislation; quite similar powers are regularly exercised by municipalities in western states in the United States.<sup>385</sup> With the Native Hawaiian claim, among other American aboriginal sovereignty claims, it is important to distinguish the claim for self-governance (and potentially independence) from the claim for control over the land base. Integration of a Native Hawaiian sovereign government within the U.S. federal system would not mean that the Native Hawaiian land claim has been denied or destroyed. What is important to tribal, and seemingly Native Hawaiian governments is that sovereignty has two components: one theoretical, and the other practical.<sup>386</sup> Creative solutions can and should allow for solving the practical problems, by allowing control over the land base and taking care of

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a separate Scottish parliament, for the first time in over 300 years, if they win the May 1997 British elections); Howard Schneider, *Canada Pressed on Indian Rights*, WASH. POST, Nov. 22, 1996, at A39 (reporting on a 4000 page report from the Royal Commission on Aboriginal People, concluding "that Canada start[s] from scratch, renegotiating virtually every aspect of Indian governance and economics" and recommending, *inter alia*, "establishment of an extensive set of new institutions: a House of First Peoples to join the Parliament . . .").

380. Tallchief Skibine, *Braid*, *supra* note 296, at 557 ("Pommersheim believes that through an analysis of the legal and political status of Indian tribes . . . we can gauge the dominant society's commitment to diversity and pluralism.").

381. *See supra* Part III.C.

382. U.S. CONST. art. IV, § 3, cl. 1.

383. *See supra* Part III.E.

384. Getches, *supra* note 24, at 1581 n.26.

385. GILLETTE, *supra* note 257, at 1363-65.

386. Tallchief Skibine, *Braid*, *supra* note 296, at 578.

"the practical needs of their people," while granting Native Hawaiians (and perhaps other mainland tribes) some special structural recognition meets the former component, by supporting "political recognition in international fora."<sup>387</sup>

Reaching a federally based or integrated solution to the Native Hawaiian claims reaches two additional ends, by disconnecting aboriginal sovereignty claims from the decolonization doctrine of self-determination. First, this disconnection addresses the concerns of smaller or less ambitious aboriginal bands who may neither want nor be able to become fully independent.<sup>388</sup> Few mainland tribes have ever, let alone consistently, advocated for independence from the United States. What Jackson said about the British Empire's views about its colonial system applies equally to aboriginal bands in the Canadian or U.S. federal system: "The only practical and responsible course of action [is] the continuation of colonial development following the distinct lines of each particular colony under the overall protection, freedom, and justice afforded by the imperial system."<sup>389</sup> The language sounds brusque and insensitive to our modern, New World Order ears — but the meaning is really no different than the message modernists prescribe, namely, treat each aboriginal group as a unique entity, with its own particular capabilities and needs.

Second, this disconnection conversely could allow additional opportunities for other large tribes in the United States to exercise greater internal sovereignty than they are currently allowed by legislation or the courts.<sup>390</sup>

A third ameliorative effect would be the removal of the need to determine non-Native Hawaiians' views about, and possible roles in, independence for the islands.<sup>391</sup>

Some would counter these arguments by stating that achieving such a heightened or "special" relationship for Native Hawaiians would be more problematic in the United States than in Canada. The U.S. federal system differs from the Canadian one; moreover the relationship between the State of Hawaii and the U.S. federal government differs from that between the NWT and the Canadian federal government.<sup>392</sup> (Indeed, that latter relationship also differs from the more typical provincial/federal relationship in Canada, and it is

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387. *Id.*

388. *See supra* note 347 (discussing the British view towards categorical colonial self-determination, and criticizing the view that all colonies were equally ready for independence in the post-World War II decolonizing period).

389. JACKSON, *supra* note 19, at 86.

390. *See supra* Part III.A.

391. VOA #4, *supra* note 341 (noting that Native Hawaiians themselves have no single view about the place of non-Native Hawaiians in the independence movement or a possible future Hawaiian state).

392. The situation would be more comparable if Hawaii were still a territory, over which jurisdictions Congress has much greater control. *See* U.S. CONST. art. IV, § 3, cl. 2; *see also supra* Part IV.A (comparing the Canadian federal position vis-à-vis the Inuit to that of the State of Hawaii and the unrecognized Native Hawaiians).



doubtful that the creation of the Territory of Nunavut would have worked anywhere outside of the Yukon or Northwest Territories.)<sup>393</sup> For Native Hawaiians, any large alterations to the relationship between themselves and the state and federal governments would require structural changes to the state/federal system, if not to the U.S. Constitution itself. Politically, others within the dominant country (for the Inuit, Canada; for Native Hawaiians, the United States) will oppose accommodating internal groups' concerns.<sup>394</sup> This opposition could originate from their being invested in the current system (such as non-Native Hawaiians living in the state) or their membership in other groups who do not stand to profit from acquiescing to Native Hawaiian concerns (such as mainland tribal leaders, or leaders of other ethnic, racial, or other minority communities). Some will say that "[i]t is too late in the day to revisit two centuries of consistently and firmly reiterated precedent or to expect a basic reformation of the historical legal relationship of the United States to Indian tribes."<sup>395</sup> Still others on the Native Hawaiian side will oppose accommodation because they see it as an incomplete response on the part of the United States to "atone" for its previous improper and illegal actions (such as the annexation and, arguably, the statehood vote).

De Jouvenel responds to all who oppose finding "creative" solutions within a Western government's constitutional framework by labeling them "cynics":

Graver by far is the mistake of the cynics . . . . For the cynics the birth of a society is due to the violence done to a population by a band of conquerors who subject them to a social discipline which is to the conquerors' advantage.

History abounds in instances of conquest. There have been those which have brought together in a single association societies which had been till then distinct . . . . But the strongest proof of the [cynic's] theory of absurdity is that it offers no explanation of how the conquering band came to be formed. Those who today conquer

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393. See *supra* note 203 (discussing the creation of the Province of Manitoba); see also Morse, *supra* note 8, at 678; see also Youngblood Henderson, *supra* note 63, at 242, 245 (arguing that "linking treaty federalism with provincial federalism would improve Canadian federalism, democracy and government" and that "[w]ithout a balance between Aboriginal perspectives and the Eurocentric view, existing federalism reflects political domination and oppression built on colonial misunderstandings").

394. See Diane Francis, *Time to Get Tough with the Natives*, MACLEAN'S, July 10, 1995, at 11 (noting increasing sentiment among nonaboriginal Canadians that "the country's bizarre aboriginal policies" are causing "awesome and overly generous bills" and "special privileges unfairly awarded to this country's aboriginals"); Bergman, *supra* note 174, at 20 (quoting a Yukon business leader who found it "appalling that we should be looking at splitting up our country even more. We've got better things to spend our money on.>").

395. Getches, *supra* note 24, at 1581.

and bring together others must in some way have been brought together themselves.<sup>396</sup>

"[N]othing is more absurd than the defence of an existing social order as just," de Jouvenel later states. "Justice is a quality, not of social arrangements, but of the human will. . . . There is no once-and-for-all scheme of things to be established and preserved; our own conceits in this respect should be abated by our poor opinion of the different conceits held by our forefathers."<sup>397</sup> In the end we should not only allow but embrace the experiment, for in de Jouvenel's words there is "a tension which is immanent in every society whatsoever — between the advantage of preserving by a sort of mummification the work accomplished by past natural authorities and the advantage of allowing new natural authorities arriving on the scene to do their work."<sup>398</sup>

Moving beyond the conquer-oriented frame of reference to voluntary association ("integration")<sup>399</sup> allows for recognition of the many positive benefits that such associations provide. "[I]ntegration — and more particularly political amalgamation — aims at the creation of a wide range of *general purpose* capabilities, often exceeding by an order of magnitude or more the capabilities of the component states."<sup>400</sup> The list of other possible goals of integration includes facilitating trade, improving economic efficiency, creating economies of scale, and, perhaps more importantly, protecting the rights of other minorities within the integrated area.<sup>401</sup>

Even Bordewich, so critical of the potential constitutional problems that aboriginal sovereignty could create, at the same time offers a positive example of how Americans of all origins can work together: the economic success of the Choctaw Indians in Mississippi. "It is a story that also suggests that tribal sovereignty, far from being a universal threat to neighboring non-Indian communities, has the capacity to become an engine for rural revitalization."<sup>402</sup> As he notes, "Indians and other Americans share not only a common history but a common future as well . . . . [T]he long-overdue revival of Indian life will bring a complete liberation of individual Indian people only if it also leads, eventually, to a more intimate, trusting, and self-confident participation of Indians in the larger American society."<sup>403</sup>

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396. DE JOUVENEL, *supra* note 29, at 29.

397. *Id.* at 164-65.

398. *Id.* at 72.

399. "Integration is a process of interpenetration of different degrees of autonomy and . . . 'is formed by a multiplicity of ranges of social communication.'" Ionescu, *supra* note 372, at 9.

400. Karl Deutsch, *Between Sovereignty and Independence: Conclusion*, in BETWEEN SOVEREIGNTY AND INTEGRATION 181 (Ghita Ionescu ed., 1974).

401. Ratner, *supra* note 57, at 592. See generally Rodden & Rose-Ackerman, *supra* note 377.

402. BORDEWICH, *supra* note 9, at 303-05.

403. *Id.* at 20-21.

